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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

CATHERINE A. GHIGLIERI, TEXAS BANKING COMMISSIONER,
Petitioner

v.

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY;
SUN WORLD NATIONAL ASSOCIATION, EL PASO, TEXAS; AND
COMMERCIAL NATIONAL BANK OF TEXARKANA,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Case Nos. 96-50847, 96-50948 and 96-10818

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in conflict with prior decisions of this Court and other Circuits, and in violation of Section 36 of the National Bank Act and the doctrine of competitive equality embodied therein, the Fifth Circuit erred by allowing the Comptroller of the Currency to imply the authority to retain branches, thereby nullifying the decision of the State of Texas to prohibit interstate branch banking.

2. Whether the Fifth Circuit's failure to consider congressional intent, as revealed in the plain language and legislative history of Section 36 of the National Bank Act, confers impermissibly broad authority on the Comptroller in violation of the constitutional framework of separation of powers and considerations of federalism.

TABLE OF CONTENTS

Questions Presented i

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Recitations of Certain Authorities

Constitutional Provisions Involved 2

Statutory Provisions Involved 3

Statement of the Case 8

Historical Overview of Legislative Scheme 8

Factual Background and the Opinions Below 10

Reasons for Granting the Petition 13

I. National Banks Possess No Implied Authority to Establish or Retain Branches; the Appealed Decisions Disregard Supreme Court Authority and Raise a Conflict Among the Circuits 16

A. This Court Has Recognized that National Banks Possess No Implied Authority to Branch 16

B. With Riegle-Neal, Congress Has Affirmed the Doctrine of Competitive Equality and the Need for Express Authority to Branch 21

C. The Fifth Circuit Has Created a Conflict Among the Circuits 24

II. The Court of Appeals Decisions Unreasonably Extend the Doctrine of Deference, and Abrogate the Constitutional Obligations Inherent in the Judicial Branch 28

A. There Is No Ambiguity in the National Bank Act Regarding Branching 28

B. Agencies May Not Resolve Statutory Ambiguities in Violation of Supreme Court Precedent or Usurp Power Expressly Withheld by Congress 30

C. Because the Comptroller's Interpretation is Unreasonable, It is Not Entitled to Deference 32

Conclusion 35

TABLE OF AUTHORITIES

FEDERAL CONSTITUTIONAL PROVISIONS, STATUTES, AND SESSION LAWS

U.S. CONST. art. III, § 1 2

5 U.S.C. §§ 702-05 . . . . . 4-6, 11

12 U.S.C. § 30 . . . . . 3 *passim*

12 U.S.C. § 36 . . . . . 4 *passim*

12 U.S.C. § 81 . . . . . 4, 21

12 U.S.C. § 93a 31

12 U.S.C. § 1823(f), (k) 18

28 U.S.C. § 1254(i) 2

28 U.S.C. § 1331 . . . . . 6, 11

28 U.S.C. § 2201(a) 6, 11

Act of June 3, 1864, Ch. 106, 13 Stat. 99 8

Act of March 3, 1865, Ch. 78, § 7, 13 Stat. 469, 484 8

Act of May 1, 1886, Ch. 73, § 2, 24 Stat. 18 10

Act of Feb. 25, 1927, Ch. 191, § 7, 44 Stat. 1228-29 8

Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 708, 94 Stat. 132 31

Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 . . . . . 9 *passim*

STATE STATUTES AND SESSION LAWS

ARK. CODE ANN. § 23-32-1202 (Michie 1994) 7, 10

N.M. STAT. ANN. §§ 58-1C-4, 58-1C-5, 58-1C-6, 58-1C-7, 58-1C-8 (1996) 7, 11

TEX. REV. CIV. STAT. ANN. art. 342-903, § 1(c) 7, 10

TEX. FIN. CODE ANN. § 32.0095 (Vernon Supp. 1998) . . 7, 10

Act of May 9, 1995, 74th Leg., R.S., ch. 58 [Tex.] 7, 10

Act of June 16, 1995, 74th Leg., R.S., ch. 914, § 26(1) [Tex.] 7

FEDERAL REGULATIONS AND AGENCY INTERPRETATIVE DECISIONS

12 C.F.R. § 5.30 32-33

12 C.F.R. § 5.40 32

12 C.F.R. § 25.62(b) 15

Overview of Proposed Rule and Comments, 62 Fed. Reg. 47,729 (1997) 15

Decision of the Office of the Comptroller of the Currency on the Applications of First Fidelity Bank, N.A., Penn., and First Fidelity Bank, N.A., N.J. (Jan. 10, 1994), *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,644, at 83,983 ("*First Fidelity*") 18-19, 33

36 Op. Att'y Gen. 116 (1929) 18-19

FEDERAL LEGISLATIVE HISTORY MATERIALS

Prepared Statement of Chairman D'Amato before the Financial Institutions Subcommittee (May 1, 1997) 35

140 CONG. REC. S12787 (daily ed. Sept. 13, 1994) (statement of Sen. Dodd) 23

140 CONG. REC. H6782 (daily ed. Aug. 4, 1994) (comments of Rep. Castle) 23

H.R. CONF. REP. No. 651, 103d Cong., 2d Sess. 47 *et seq.* (Aug. 2, 1994) 13, 23-24, 35

S. REP. No. 473, 69th Cong., 1st Sess. 8 (1926) 18

FEDERAL CASES

Adams Fruit Co. v. Barrett, 494 U.S. 638, 110 S. Ct. 1384 (1990) 31

Barnett Bank of Marion County v. Nelson, __ U.S. __, 116 S. Ct. 1103 (1996) 24, 34

Camden Trust Co. v. Gidney, 301 F.2d 521 (D.C. Cir.), *cert. denied*, 369 U.S. 886, 82 S. Ct. 1158 (1962) 25-26

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778 (1984) 12, 28-29, 31-32

Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 107 S. Ct. 750 (1987) 9, 28

Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 93 S. Ct. 1773 (1973) 34-35

First Nat'l Bank in St. Louis v. Missouri, 263 U.S. 640, 44 S. Ct. 213 (1924) 8, 16-18, 20, 22, 27, 33

First Nat'l Bank of Southaven v. Camp, 333 F. Supp. 682 (N.D. Miss. 1971), *aff'd mem.*, 467 F.2d 944 (5th Cir. 1972) 25

First Nat'l Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252, 87 S. Ct. 492 (1966) . 17, 19, 21, 27-28

First Nat'l Bank in Plant City v. Dickinson, 396 U.S. 122, 90 S. Ct. 337 (1969) 19-20, 24-25, 28

Ghiglieri v. Ludwig, 125 F.3d 941 (5th Cir. 1997) . . . 2, 11-13

Ghiglieri v. Sun World, N.A., 117 F.3d 309 (5th Cir. 1997) 1, 2, 11-12

Ghiglieri v. Sun World, N.A., 942 F. Supp. 1111 (W.D. Tex. 1996) 1, 11

Kmart Corp. v. Cartier, Inc., 486 U.S. 281, 108 S. Ct. 1811 (1988) 28-29

Lopez v. Heckler, 713 F.2d 1432 (9th Cir. 1983) 30-31

Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 110 S. Ct. 2759 (1990) 30

Marion Nat'l Bank v. Van Buren Bank, 418 F.2d 121 (7th Cir. 1969) 24-26

Mistretta v. United States, 488 U.S. 361, 109 S. Ct. 647 (1989) 14

Mutschler v. Peoples Nat'l Bank of Wash., 607 F.2d 274 (9th Cir. 1979) (per curiam) 27

National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 94 S. Ct. 690 (1974) . . 21

NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 115 S. Ct. 810 (1995) 32

Ramapo Bank v. Camp, 425 F.2d 333 (3d Cir.), *cert. denied*, 400 U.S. 828, 91 S. Ct. 57 (1970) 25-26

Seattle Trust & Sav. Bank v. Bank of Cal., N.A., 492 F.2d 48 (9th Cir.) (per curiam), *cert. denied*, 419 U.S. 844, 95 S. Ct. 77 (1974) 26-28

State of Wash. v. Heimann, 633 F.2d 886 (9th Cir. 1980) 26-27

Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986) (per curiam) 14

Texas & Pac. Ry. Co. v. Pottorff, 291 U.S. 245, 54 S. Ct. 416 (1934) 20, 29

Traverse City State Bank v. Empire Nat'l Bank, 228 F. Supp. 984 (W.D. Mich. 1964) 26, 33

USAA v. Perry, 102 F.3d 144 (5th Cir. 1996) 29

White v. INS, 75 F.3d 213 (5th Cir. 1996) 32

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Stephen Breyer, *The 1991 Justice Lester W. Roth Lecture on the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) 30

Conference of State Bank Supervisors, *Status of Interstate Branching Legislation in the States* 15

KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT § 1.08 (3d ed. 1972) 13-14

Mark D. Rollinger, *Interstate Banking and Branching Under the Riegle-Neal Act of 1994*, 33 HARV. J. ON LEGIS. 183 (1996) 22

Saxon Affidavit 33

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PETITION FOR A WRIT OF CERTIORARI

Catherine A. Ghiglieri, in her official capacity as Texas Banking Commissioner ("Petitioner"), requests that a writ of certiorari issue to review the judgments of the Fifth Circuit Court of Appeals in these cases.

OPINIONS BELOW

The opinion of the Court of Appeals in *Ghiglieri v. Sun World, N.A.* is reported at 117 F.3d 309 (5th Cir. 1997) (Petitioner's Appendix ("Pet. App.") A). The opinion of the district court is reported at 942 F. Supp. 1111 (W.D. Tex. 1996) (Pet. App. C).

The opinion of the Court of Appeals in *Ghiglieri v. Ludwig* is reported at 125 F.3d 941 (5th Cir. 1997) (Pet. App. B). The opinion of the district court is not reported (Pet. App. D).

JURISDICTION

The judgment of the Court of Appeals in *Ghiglieri v. Sun World* was entered on July 22, 1997, and the Petition for Rehearing and the Suggestion for Rehearing En Banc were denied on September 25, 1997 (Pet. App. G). The Court of Appeals entered its judgment in *Ghiglieri v. Ludwig* on October 29, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of Article III, United States Constitution, provides as follows:

> **Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

STATUTORY PROVISIONS INVOLVED

A. Section 30 of Title 12, United States Code, provides in pertinent part:

> **(b) Location change**
>
> Any national banking association, upon written notice to the Comptroller of the Currency, may change the location of its main office to any authorized branch location within the limits of the city, town, or village in which it is situated, or, with a vote of shareholders owning two-thirds of the stock of such association for a relocation outside such limits and upon receipt of a certificate of approval from the Comptroller of the Currency, to any other location within or outside the limits of the city, town, or village in which it is located, but not more than thirty miles beyond such limits.
>
> **(c) Coordination with section 36 of this title**
>
> In the case of a national bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State from which the bank relocated such office only to the extent authorized in section 36(e)(2) of this title.

B. Section 36 of Title 12, United States Code, provides in pertinent part:

§ 36. Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

The full text of § 36 is set forth at Pet. App. H.

C. Section 81 of Title 12, United States Code, provides:

The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

D. Section 702 of Title 5, United States Code, provides in pertinent part:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . .

E. Section 703 of Title 5, United States Code, provides in pertinent part:

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter

in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

F. Section 704 of Title 5, United States Code, provides in pertinent part:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

G. Section 1331 of Title 28 United States code, provides in pertinent part:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

H. Section 2201(a) of Title 28 United States Code, provides in pertinent part:

> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

I. Article 342-903, Texas Revised Civil Statutes (repealed effective Sept. 1, 1995 by Act of June 16, 1995, 74th Leg., R.S., ch. 914, § 26(1)), provided in pertinent part:

> Sec. 1. (c) Branch offices may be established anywhere in the state on prior written approval of the Banking Commissioner. . . .

J. Act of May 9, 1995, 74th Leg., R.S., ch. 58 (effective Aug. 28, 1995) (now codified at TEX. FIN. CODE ANN. § 32.0095 (Vernon Supp. 1998)), provides in pertinent part:

> SECTION 2. INTERSTATE MERGERS AND BRANCHES PROHIBITED. Notwithstanding any other law:
>
> (1) [merger provision omitted]
>
> (2) an out-of-state bank may not establish a de novo branch in this state or acquire a branch in this state by purchase or other means; and
>
> (3) a domestic bank may not establish a de novo branch in a state other than this state or acquire a branch in a state other than this state by purchase or other means.

K. ARK. CODE ANN. § 23-32-1202 (Michie 1994) is set forth at Pet. App. I.

L. N.M. STAT. ANN. §§ 58-1C-4, 58-1C-5, 59-1C-6, 58-1C-7, 58-1C-8 (1996) is set forth at Pet. App. J.

STATEMENT OF THE CASE

Historical Overview of Legislative Scheme. This petition addresses two decisions of the Comptroller of the Currency ("Comptroller") permitting national banks to relocate across Texas state lines and retain branches in the original host states — despite the fact that federal law prohibits the Comptroller's decisions. By permitting the retention of interstate branch banks after Sun World, N.A. ("Sun World") and Commercial National Bank ("CNB") moved their main offices across Texas state lines, the Comptroller has accomplished through administrative fiat what he could not secure through congressional enactments.

As initially enacted, the National Bank Act did not confer branching power upon national banks.[1] At that time, in contrast, some state banks already had branching powers. When, in the early years of this century, the Comptroller tried to approve branching by national banks, this Court held emphatically that the authority to branch could not be implied under the National Bank Act.[2] Therefore, in order to equalize branching authority between state and national banks, in 1927 Congress enacted the McFadden Act.[3] That amendment to Section 36 of the National Bank Act

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[1] Congress enacted the National Bank Act in the Act of June 3, 1864, Ch. 106, 13 Stat. 99. In 1865, Congress passed a law (now codified at 12 U.S.C. § 36(b)) allowing state banks that converted to a national charter to retain existing branches. Act of March 3, 1865, Ch. 78, § 7, 13 Stat. 469, 484. This action reflected Congress' early understanding that express statutory authority was necessary for a national bank to retain branches.

[2] *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 659, 44 S. Ct. 213, 216 (1924).

[3] Act of Feb. 25, 1927, Ch. 191, § 7, 44 Stat. 1228-29.

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authorizes national banks to retain branches under limited and specified circumstances, and to establish branches to the extent permitted their state counterparts under applicable state law, thus establishing the principle of competitive equality.

> The McFadden Act was in large part a compromise in which Congress started from a general antibranching rule and created a limited exception just large enough to allow national banks to compete effectively with state banks, but also narrow enough to continue to serve the policy of exercising control on the financial power of national banks.

Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 410, 107 S. Ct. 750, 762 (1987) (Stevens, J., concurring). The McFadden Act thus expressly adopted state law as one key metric of the branching power of national banks.

In 1994, in contemplation of the expansion of the national branch banking system, Congress enacted the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 ("Riegle-Neal") (Pet. App. K). Riegle-Neal does not abrogate the statutory principle embodied in Section 36 that, with a few exceptions not applicable here, state law controls the limits of branching by national banks. Instead, it extends that principle to the new arena of interstate branch banking. Recognizing the continued importance of state autonomy in this area, Congress reserved to each state the right to opt-out of interstate branch banking under Riegle-Neal.[4] Effective September

[4] Riegle-Neal, § 102(a)-(b), 108 Stat. at 2343-44 and 2349.

1, 1995, the Texas Legislature unanimously opted-out of interstate branch banking.[5]

Factual Background and the Opinions Below. Prior to the effective date of Texas' opt-out, CNB filed two applications with the Comptroller — one seeking to move its main office from Texarkana, Arkansas to Texarkana, Texas (a distance of less than thirty miles),[6] and the other seeking to establish its former main office as an Arkansas branch. Neither Texas nor Arkansas law allowed interstate branch banking.[7] Over the objection of the Texas Banking Commissioner ("Texas Commissioner"), the Comptroller nonetheless approved the applications, allowing CNB to relocate and establish interstate branches. The Comptroller concluded that Section 30, by implication, allowed the retention of the branches following relocation, although these branches could not be established or retained under the language of Section 36. The Texas Commissioner then filed for declaratory and injunctive relief in the United States District Court for the Northern District of Texas.

After the effective date of Texas' opt-out, Sun World filed applications to move its main office two miles from El Paso, Texas to Santa Teresa, New Mexico, and to establish its former main

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[5] Act of May 9, 1995, 74th Leg., R.S., ch. 58 (now codified at TEX. FIN. CODE ANN. § 32.0095 (Vernon Supp. 1998)).

[6] In 1886, prior to the decision in *St. Louis*, Congress added Section 30 to authorize national banks to relocate their main offices within a distance of not more than thirty miles. Act of May 1, 1886, Ch. 73, § 2, 24 Stat. 18. (Section 30 does not discuss branching.)

[7] TEX. REV. CIV. STAT. ANN. art. 342-903, § 1(c); ARK. CODE ANN. § 23-32-1202 (Pet. App. I).

office in Texas as a branch.[8] The Texas Commissioner filed an action for declaratory and injunctive relief against Sun World in the United States District Court for the Western District of Texas. When the Comptroller approved the applications, and intervened in the lawsuit, the Texas Commissioner filed an amended complaint against Sun World and the Comptroller.

Sun World, CNB (collectively the Banks"), and the Comptroller each filed motions to dismiss in the District Courts, or in the alternative, for summary judgment. In each action, the Texas Commissioner filed a cross-motion for summary judgment urging that national banks possess no implied authority to branch, either before or after Riegle-Neal.[9] The District Courts granted the Texas Commissioner's cross-motions for summary judgment and set aside the Comptroller's decisions that approved the Banks' applications. *See Ghiglieri v. Ludwig*, Findings of Fact and Conclusions of Law (unreported) (Pet. App. D); *Ghiglieri v. Sun World*, 942 F. Supp. 1111 (Pet. App. C).

The Comptroller and the Banks appealed in both cases. On July 22, 1997, the Fifth Circuit reversed the District Court's decision in *Sun World*. *See* 117 F.3d 309 (Pet. App. A). In that opinion, the Fifth Circuit purported to apply this Court's test for reviewing an agency's interpretation of a statute set forth in

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[8] New Mexico permitted branching only on a reciprocal basis. *See* N.M. STAT. ANN. §§ 58-1C-4, 58-1C-5, 58-1C-6, 58-1C-7, 58-1C-8 (1996) (Pet. App. J). Because interstate branching was not permissible in Texas, New Mexico law did not authorize the Texas branches.

[9] In the actions, the Texas Commissioner challenged the Comptroller's decisions pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 702, 703, and 704, thereby invoking the courts' federal-question jurisdiction under 28 U.S.C. § 1331 and the federal declaratory judgment statute, 28 U.S.C. § 2201(a).

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778 (1984). In applying the first prong of *Chevron*, the Court of Appeals concluded, without examining legislative history, that the National Bank Act is silent with regard to the retention or divestiture of branches following a relocation. The Fifth Circuit then turned to the second prong of *Chevron* and held that the Comptroller reasonably interpreted the statute to allow such retention. *See Sun World*, 117 F.3d at 314 (Pet. App. A-7).

The Texas Commissioner filed a Petition for Rehearing and a Suggestion for Rehearing En Banc, asserting that (i) the Banks have no implied authority to establish or retain interstate branches, and the assertion of such implied authority under Section 30 contravenes the doctrine of competitive equality reflected in the branching limitations of Section 36, and (ii) the appellate court's failure to consider Congress' intent, as revealed by the plain language and legislative history of Section 36, conflicts with this Court's decision in *Chevron*, and allows the Comptroller to defy legislative authority in violation of the doctrine of separation of powers. The petition for rehearing and suggestion for rehearing en banc were denied on September 25, 1997 (Pet App. G).

On October 29, 1997, the Fifth Circuit rendered its opinion in the CNB case (*Ghiglieri v. Ludwig*), relying on its *Sun World* decision to reverse the District Court. 125 F.3d 941 (Pet. App. B).

In his concurring opinion filed in the CNB case, Judge Reavley stated:

> My esteemed colleagues are in error, however, when they say that § 36 is silent with respect to

> the retention of branches after relocation of the main office. Section 36 begins: "The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:"

Ghiglieri v. Ludwig, 125 F.3d at 944 (Pet. App. B-6).

REASONS FOR GRANTING THE PETITION

This petition presents a case of agency defiance of Supreme Court precedent and a conflict among the Circuits concerning the principle of competitive equality between national and state-chartered banks. In addition, it raises important issues regarding the encroachment of agency powers on constitutionally established policies of federalism and the limits of the doctrine of deference in the face of non-compliant agency conduct. In 1994, congressional conferees directly criticized the Comptroller for improperly displacing state banking laws that should have been applicable to national banks. H.R. CONF. REP. No. 651, 103d Cong., 2d Sess. 53 (Aug. 2, 1994) ("During the course of consideration of the title, the Conferees have been made aware of certain circumstances in which the Federal banking agencies have applied traditional preemption principles in a manner the Conferees believe is inappropriately aggressive, resulting in preemption of State law in situations where the federal interest did not warrant that result.") (Pet App. L-13).

The danger of agency overreaching is not new. In 1937, the President's Committee on Administrative Management cautioned that administrative agencies "constitute a headless 'fourth branch' of the Government, a haphazard deposit of irresponsible

agencies and uncoordinated powers. They do violence to the basic theory of the American Constitution that there should be three major branches of the Government and only three." KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT § 1.08, at 24 (3d ed. 1972). More recently, a federal court has observed that it has "always been difficult to reconcile [the] 'headless fourth branch' with a constitutional text and tradition establishing three branches of government." *Synar v. United States*, 626 F. Supp. 1374, 1398 (D.D.C. 1986) (per curiam).

Our democratic system of government presupposes the separation of powers to guard against the danger that one governmental branch will aggrandize power at the expense of another. *Mistretta v. United States*, 488 U.S. 361, 381-82, 109 S. Ct. 647, 660 (1989). One "protection against [such] tyranny comes . . . from our system of judicial review of administrative action." DAVIS, ADMINISTRATIVE LAW TEXT § 1.08, at 25. The facts prompting this petition represent an erosion of that system: the Comptroller has overstepped the statutory limits of his authority, and the Court of Appeals, under a mistaken application of deference principles, has abdicated its responsibility to hold excessive administrative activism in check.

The questions presented in this petition are not academic. The Comptroller has allowed two national banks to secure branching advantages that none of their state competitors in the affected states possess. For example, Sun World — a subsidiary of the largest bank in Texas, NationsBank — will enjoy unique corporate efficiencies, escape state franchise taxes, and even avoid certain

reporting requirements that are applicable to all Texas state-chartered banks.[10]

Nor is the problem isolated. Between 1994 and June 1997, numerous branches were established nationwide using the Comptroller's flawed interpretation of Section 30. *See, e.g.*, Overview of Proposed Rule and Comments, 62 Fed. Reg. 47,729 (1997). These unlawful branches are likewise exempt from provisions of Riegle-Neal, such as deposit production restrictions.[11] Moreover, even after Riegle-Neal, many states that permit interstate branching allow it to occur primarily through mergers (rather than de novo), and still impose bank age restrictions as a precondition to such mergers.[12] The Comptroller's interpretation effectively exempts a significant number of national branching networks from these valid restrictions. The challenged interpretation thus disrupts the level playing field envisioned by Congress for the dual banking system.

The Comptroller has impressed on Texas an involuntary system of interstate branch banking despite Texas' explicit rejection of that system under both the McFadden Act and Riegle-Neal. The Comptroller's blatant disregard of the congressional scheme of competitive equality provides a compelling reason for review by this Court. Not only do the challenged decisions conflict with this

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[10] *See, e.g.*, 12 C.F.R. § 25.62(b) (effectively exempting branches established pursuant to Section 30 prior to June 1, 1997 from the loan-to-deposit ratios imposed by the deposit production rules).

[11] *See* Riegle-Neal, § 109 (Pet. App. K-52).

[12] According to the Conference of State Bank Supervisors, *Status of Interstate Branching Legislation in the States*, as of July 8, 1997, more than thirty states impose a five-year minimum age restriction on the bank acquired through merger.

Court's and other Circuits' pronouncements regarding branch banking, the decisions also illustrate the need for guidance from this Court as to the limits and proper application of the doctrine of deference.

I. NATIONAL BANKS POSSESS NO IMPLIED AUTHORITY TO ESTABLISH OR RETAIN BRANCHES; THE APPEALED DECISIONS DISREGARD SUPREME COURT AUTHORITY AND RAISE A CONFLICT AMONG THE CIRCUITS

Branching is not an area about which Congress has been indifferent. Extensive legislative history confirms Congress' intent to place state and national banks on an equal footing. Nor have the courts been indecisive on this issue. Decision after decision reiterates that the purpose of the McFadden Act is to promote competitive equality in branch banking. The conclusion of the Comptroller and the Court of Appeals that an implied power to branch can be inferred from the National Bank Act as a necessary adjunct to Section 30 conflicts with decisions of this Court and thwarts the doctrine of competitive equality.

A. This Court Has Recognized that National Banks Possess No Implied Authority to Branch

In 1924, the Supreme Court, after reviewing the legislative history of the National Bank Act, struck down a decision of the Comptroller allowing a national bank to establish branches, and held that branching authority does not exist by implication:

> The extent of the powers of national banks is to be measured by the terms of the federal statutes relating to such associations, and they can

> rightfully exercise only such [powers] as are expressly granted or such incidental powers as are necessary to carry on the business for which they are established. . . . [I]t is wholly illogical to say that a power which by fair construction of the statutes is found to be denied, nevertheless exists as an incidental power. . . . [N]ational banking associations have gone on for more than half a century without branches and upon the theory of an absence of authority to establish them.

First Nat'l Bank in St. Louis v. Missouri, 263 U.S. 640, 656, 659, 44 S. Ct. 213, 215-16 (1924). In so holding, the Supreme Court recognized that which the Comptroller ignored and the Court of Appeals has overlooked: Section 30, enacted long before the holding in *St. Louis*, did not imply any branching authority; express authority is required.

Subsequent to *St. Louis*, Congress passed the McFadden Act in 1927, now codified at Section 36. *See First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 257-58, 87 S. Ct. 492, 495-96 (1966). The preamble of the McFadden Act could not be more explicit:

> **§ 36. Branch banks**
>
> The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:
>
> . . . .

Section 36 then proceeds to specify the *narrow* grounds pursuant to which a national bank may retain, establish and operate

branch banks. Congress thus assembled in one section virtually all of the conditions under which national banks could have branches.[13] *Cf. Decision of the Office of the Comptroller of the Currency on the Applications of First Fidelity Bank, N.A., Penn., and First Fidelity Bank, N.A., N.J.* (Jan. 10, 1994), *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,644, at 83,983 ("*First Fidelity*") ("[B]ranching is generally allowed only in the ways the McFadden Act specifies"); *see also* S. REP. No. 473, 69th Cong., 1st Sess. 8 (1926) (Section 36 generally embodies "all of the conditions under which national banks may have branches"). Where Congress perceived the need for additional branches, it enacted express provisions to allow branching in those specific circumstances. *See, e.g.*, 12 U.S.C. § 1823(f) and (k); *see also St. Louis*, 263 U.S. at 658, 44 S. Ct. at 215-16.

Interpreting the McFadden Act in 1929, the United States Attorney General also rejected the argument that national banks have implied authority to retain branches. The question then posed has particular relevance here: May a national bank with two branches lawfully established after 1927, which is consolidating with a state bank having two pre-1927 branches grandfathered under Section 36(a), thereafter retain all four branches? The Attorney General concluded that the consolidated bank could retain only the grandfathered branches, but had no power to retain the two post-1927 branches — even though they were lawfully existing

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[13] The Act, following the introductory clause, specifies the limits of branch retention authority in subsection (a) relating to pre-1927 (grandfathered) branches; in subsection (b)(1) relating to converting state banks; and in subsection (b)(2) relating to the consolidation or merger of banks with existing branches.

up until the moment of the consolidation. 36 Op. Att'y Gen. 116, 121 (1929).[14]

Since the McFadden Act extended branching authority to national banks, the doctrine of competitive equality between state and national banks has been an overarching principle of the National Bank Act's branching provisions. *Logan*, 385 U.S. at 261, 87 S. Ct. at 497. *Logan*, the first case in which this Court interpreted branching power under the McFadden Act, suggested a simple test: If a state bank cannot do it, a national bank cannot do it either. *Id.*, 385 U.S. at 260, 87 S. Ct. at 497 ("As finally passed, the Act permitted national banks to establish outside branches *if* such branches could be established by state banks under state law.") (emphasis added). In *Logan*, this Court refused to construe the National Bank Act to frustrate Congress' clear and longstanding purpose of placing state and national banks on an equal competitive basis in matters of branching. *Id.*, 385 U.S. at 261, 87 S. Ct. at 497.

In *First National Bank in Plant City v. Dickinson*, this Court reiterated that "Congress has deliberately settled upon a policy intended to foster 'competitive equality.' . . . [The McFadden] Act reflects the congressional concern that neither system have advantages over the other in the use of branch banking." *Id.*, 396 U.S. 122, 131, 90 S. Ct. 337, 342 (1969). "Nor is the congressional policy of competitive equality with its deference to state standards open to modification by the

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[14] Congress subsequently amended Section 36 in 1962 to provide express authority for the retention of post-1927 branches following the conversion of a state bank to a national charter, again signalling that express legislation is required to confer branch retention powers. *See First Fidelity*, *supra* p. 18, at 83,987 & 83,999-84,000 n.40.

Comptroller of the Currency." *Id.*, 396 U.S. at 138, 90 S. Ct. at 345.

The Comptroller nonetheless now contends that Section 30, a provision that does not even mention the subject of branching, trumps the subsequent explicit limitations of Section 36. This Court's decision in *St. Louis*, rendered nearly forty years *after* the passage of Section 30, explodes that argument. Indeed, under Section 36(c), the "implication" of authority to branch is directly forbidden; the authority must be either "expressly authorized"[15] or "specifically" and "affirmatively" granted.[16] *See also St. Louis*, 263 U.S. at 656, 659, 44 S. Ct. at 215-16; *Texas & Pac. Ry. Co. v. Pottorff*, 291 U.S. 245, 253, 54 S. Ct. 416, 417 (1934) ("[P]owers not conferred by Congress [to national banks] are denied."). It is not the absence of a Section 36 directive to divest retained branches following a relocation, but rather the *lack* of a Section 36 grant of such retention authority, that governs the outcome of this case.

When Congress wanted to provide for the continued retention of preexisting branches, it had no difficulty making its intention manifestly clear. For example, it did so explicitly in the context of state bank conversions and national bank consolidations in Section 36(b), including those situations where a former main office is subsequently treated as a branch.[17] Therefore, the rule of *expressio unius est exclusio alterius* further refutes the existence of any implied power to retain branches under Sections 30 or 36.

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[15] Section 36(c)(1).

[16] Section 36(c)(2).

[17] Section 36(b)(2)(A).

Cf. National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458, 94 S. Ct. 690, 693 (1974). In addition, Section 81 of the National Bank Act provides that a national bank may operate only at the place identified in its organization certificate and at branches established in accordance with Section 36 — further exposing the fallacy of the Comptroller's argument that Section 30 provides any branching authority.

If, as the Comptroller argues, interstate branching could be accomplished merely through the device of a Section 30 relocation with implied branch retention, the later enactment of Section 36 to create branching authority subject to carefully drawn limits would have been a superfluous congressional gesture. A national bank could, by seriatim relocations, leave a wake of multiple branches regardless of contrary state law.

The Supreme Court has not been misled by such clever attempts to evade state branching laws and has consistently applied the simple test of *Logan*: If a state bank cannot do it, a national bank cannot do it either. As discussed below, because the Comptroller's interpretation is inimical to the purpose of the McFadden Act and to Riegle-Neal, the Court of Appeals erred in deferring to the agency.

B. With Riegle-Neal, Congress has Affirmed the Doctrine of Competitive Equality and the Need for Express Authority to Branch

The rulings below allow the Banks to establish an interstate network overriding Texas' opt-out under Riegle-Neal. The Comptroller contends that Riegle-Neal's grant of limited authority *after* May 31, 1997 to retain branches following a relocation

implies a recognition of *unlimited* authority *until* that date. This argument is refuted by the plain language and legislative history of Sections 30, 36 and the Riegle-Neal amendments.

In 1994, Riegle-Neal specifically created limited branch retention authority in the context of a main office interstate relocation. Congress added a new subsection (c) to Section 30 and a new subsection (e) to Section 36.[18] These provisions, in tandem, authorize a national bank to retain its branches after relocating across state lines, but only where such branches could be established under state law. (The provisions became effective on June 1, 1997.)

Although Riegle-Neal provides for interstate branch banking, the states retain discretion to determine how, when and where banks can operate branches. The Act "does little more than remand to the states the question of interstate branching." Mark D. Rollinger, *Interstate Banking and Branching Under the Riegle-Neal Act of 1994*, 33 HARV. J. ON LEGIS. 183, 187 (1996).

The conclusion that Section 36(e)(2) of the Riegle-Neal amendments limits a pre-existing power of national banks to retain interstate branches contrary to state law inaccurately assumes that Riegle-Neal was written on a blank slate. Congress did not purport to suspend the McFadden Act during the hiatus between the enactment of Riegle-Neal and its effective date. Instead, during that period, the McFadden Act, its overriding principle of competitive equality, and the holding in *St. Louis* continued to control branching.

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[18] *See* Riegle-Neal, 108 Stat. at 2349-50.

In essence, the Comptroller urges that Congress intended competitive *inequality* until June 1, 1997. Not one statement during the congressional hearings or the committee conferences lends any credence to this claim. In fact, the legislative history reflects overwhelming congressional support of state autonomy with respect to interstate branching.

> [The bill] strikes the proper balance between creating a more efficient national banking system and protecting States rights and the dual banking system. It respects the interests of States by giving them a long transition time and requiring branches to abide by applicable State laws.

140 CONG. REC. S12787 (daily ed. Sept. 13, 1994) (statement of Sen. Dodd).[19]

The deferral of Riegle-Neal's effective date until June 1, 1997 was designed to allow the *states* sufficient time to consider whether to participate in interstate branch banking — not to afford the Comptroller time to preempt that choice. *See* 140 CONG. REC. H6782 (daily ed. Aug. 4, 1994) (comments of Rep. Castle). It is evident that Congress did not share the Comptroller's belief that he already possessed the unilateral power to implement nationwide interstate branch banking without express authority.[20]

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[19] Moreover, the Conference Report repeatedly affirms the importance of state law in the branching scheme. H.R. CONF. REP. No. 651, 103d Cong., 2d Sess. 47 *et seq.* (Aug. 2, 1994) (Pet. App. L).

[20] The Comptroller and the Fifth Circuit relied on one out-of-context snippet from the Riegle-Neal Conference Report as support that the Conferees "approved" the unqualified retention of interstate branches following a Section 30 relocation during the period between enactment of Riegle-Neal and its effective date. In

Following the enactment of Riegle-Neal, this Court has recognized the continuing vitality of the McFadden Act. *Barnett Bank of Marion County v. Nelson*, __ U.S. __, 116 S. Ct. 1103 (1996). Distinguishing other cases regarding the interpretation of federal banking statutes, Justice Breyer stated that the McFadden Act is a grant of explicit power with an explicit provision that the exercise of that power is subject to state law. *Id.* __ U.S. at __, 116 S. Ct. at 1109 (citing *Plant City* and *Logan*). The decisions below completely ignore this recent affirmation of the policy of competitive equality.

C. The Fifth Circuit has Created a Conflict Among the Circuits

The essential issue presented to the Fifth Circuit was whether the retention of branches must comply with Section 36 (and thus state law) after a main office relocation pursuant to Section 30. The Fifth Circuit's answer creates a conflict with its sister courts.

Three Circuit Courts have looked at simultaneous relocation and branching transactions. The issue was first considered by the Seventh Circuit in *Marion Nat'l Bank v. Van Buren Bank*, 418 F.2d 121 (7th Cir. 1969). It determined that the transaction did not involve a *bona fide* main office relocation. *Id.* 124-25. Had the relocation been bona fide, the *Marion* court made

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fact, the Conferees did not intend to alter the balance of federal and state law under the dual banking system. H.R. CONF. REP. No. 651, 103d Cong., 2d Sess. 53 (Aug. 2, 1994). The Report emphasizes the Conferees' expectation that the procedures employed by the Comptroller in permitting main office interstate relocations will include "the application of appropriate State law and authority." *Id.* at 57 (Pet. App. L-19).

it clear that the branching would nevertheless have had to independently satisfy state law under Section 36. *Id.* at 124. The court noted that the branch-back application would only have been permitted if it complied with the state law limitation on the number of banks operating in a city. *Id.*

The Fifth Circuit, prior to the appealed decisions, agreed with *Marion* that the Comptroller should "consider the relationship of the two statutes [§§ 30 and 36] to test the good faith nature of simultaneous applications," since an overall view was necessary to preserve the substance of competitive equality. *See First Nat'l Bank of Southaven v. Camp*, 333 F. Supp. 682, 689 (N.D. Miss. 1971), *aff'd mem.*, 467 F.2d 944 (5th Cir. 1972).

The Third Circuit took the view that state law does not constrain a Section 30 relocation. *Ramapo Bank v. Camp*, 425 F.2d 333, 344 (3d Cir.), *cert. denied*, 400 U.S. 828, 91 S. Ct. 57 (1970). *Ramapo*, unlike *Marion*, concluded that the main office relocation was not a sham to evade state law. However, the Third Circuit acknowledged *Plant City*'s language that "state law comes into play in deciding how, where, and when branch banks may be operated [since] Congress entrusted to the States the regulation of branching." *Id.* at 346. There, the branching application presented no state law infirmity; as the Court noted, the parties conceded there was no legal objection to the branch-back application itself. *Id.* at 344 n.31.

In dicta, the D.C. Circuit agreed with a decision of the Comptroller to *deny* a bank's application to relocate its main office and retain its former main office as a branch where the branch

could not have been maintained under state law.[21] *Camden Trust Co. v. Gidney*, 301 F.2d 521, 522 (D.C. Cir.), *cert. denied*, 369 U.S. 886, 82 S. Ct. 1158 (1962); *see also Traverse City State Bank v. Empire Nat'l Bank*, 228 F. Supp. 984, 993 (W.D. Mich. 1964) (distinguishing *Camden Trust* on the ground that the branch resulting from the main office relocation in *Camden Trust* violated Section 36(c), whereas the "resulting branch bank" in *Traverse* had "not [even] been challenged").

In refusing to apply Section 36 to the branching aspects of the Banks' applications, the appealed decisions conflict with the holdings in *Marion* and *Southaven*, as well as the dicta in *Camden Trust* and the branching rationale quoted in *Ramapo*. Moreover, although ostensibly relying on the case, the Fifth Circuit has also created a conflict with the Ninth Circuit's decision in *Seattle Trust & Savings Bank v. Bank of California, N.A.*, 492 F.2d 48 (9th Cir.) (per curiam), *cert. denied*, 419 U.S. 844, 95 S. Ct. 77 (1974).

The Court of Appeals cites *Seattle Trust* as support for the proposition that the Banks may, under Section 36(c), establish their *new* branches in the former host state (at the sites of their former main offices) because they are already "situated" there. However, the record in *Seattle Trust* revealed that the existing Washington branches complied with Section 36(a) and thus were *lawfully* situated in that state. *Seattle Trust*, 492 F.2d at 51. Like the Comptroller, the Fifth Circuit overlooks the crucial fact that there

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[21] This discussion is dicta in *Camden Trust* because the bank's shareholders responded to the Comptroller's denial by chartering a new, separate bank (and not moving the main office of their first bank after all). The D.C. Circuit declined to apply Section 36 to the new bank only because it did not fall within the statutory definition of a "branch."

is no corresponding Section 36 authority here to retain the preexisting branches. *Cf. State of Wash. v. Heimann*, 633 F.2d 886, 889-90 (9th Cir. 1980) (holding that branches established through acquisition must be tested under Section 36(c)); *Mutschler v. Peoples Nat'l Bank of Wash.*, 607 F.2d 274, 278 (9th Cir. 1979) (per curiam) (holding that relocations of existing branches, like the establishment of new branches, are subject to Section 36(c)).

Moreover, Washington state banks possessed the authority to branch in the manner sought by the national bank, and the Ninth Circuit found, in that fact, a compelling demonstration that according similar rights to the national bank would foster competitive equality. The Ninth Circuit left no mistake about its rationale:

> Section 36(c)(1) and (2) . . . must be interpreted in the light of congressional desire to foster a climate of "competitive equality" between national and state banks; *it is not for the courts, in construing the Act, to frustrate that clear congressional purpose.*

Id. at 52 (emphasis added).

Contrary to the rationale in *Seattle Trust*, the Fifth Circuit has upheld the Comptroller's decisions to allow the Banks to do what no other bank can — branch back across state lines in violation of state law. In so holding, the decision of the Court of Appeals conflicts with other Circuit Court decisions — in addition to Supreme Court precedent — while thwarting Congress' objective to maintain competitive equality. *See, e.g., First Nat'l Bank in St. Louis*, 263 U.S. 640, 44 S. Ct. 213; *First Nat'l Bank of Logan*,

385 U.S. 252, 87 S. Ct. 492; *First Nat'l Bank in Plant City*, 396 U.S. 122, 90 S. Ct. 337; *Clarke*, 479 U.S. 388, 107 S. Ct. 750.

II. THE COURT OF APPEALS DECISIONS UNREASONABLY EXTEND THE DOCTRINE OF DEFERENCE, AND ABROGATE THE CONSTITUTIONAL OBLIGATIONS INHERENT IN THE JUDICIAL BRANCH

A. There is No Ambiguity in the National Bank Act Regarding Branching

The holdings below hinge on the erroneous conclusion, under the first prong of *Chevron*, that Congress has not spoken to the issue of branch retention following main office relocation. In reaching this conclusion, the Court failed to examine the language of the National Bank Act as a complete, integrated scheme, and neglected to consider the legislative histories of Section 30, Section 36, and Riegle-Neal. By misapplying the *Chevron* test, the Fifth Circuit impermissibly allowed the Comptroller to usurp both legislative and judicial functions. This Court should grant this petition to ensure that the lower courts do not abandon their constitutionally mandated duty by improvidently deferring to agency misbehavior.

In reviewing an agency's construction of a statute that it administers, a court must first ask "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842, 104 S. Ct. at 2781. "[D]eference . . . to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 1817 (1988). In ascertaining the plain meaning of the statute, the court must look to the particular statutory

language at issue, as well as the language and design of the statute as a whole. *Id.* "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9, 104 S. Ct. at 2781-82 n.9. *If and only if* those traditional tools of statutory construction do not reveal Congress' intent, then it is appropriate to consider whether the agency's interpretation is reasonable. *See id.*, 467 U.S. at 842-43 n.9, 104 S. Ct. at 2781-82 n.9; *USAA v. Perry*, 102 F.3d 144, 147 (5th Cir. 1996).

There is no ambiguity in this legislative plan. Although the Comptroller seeks to fragment the National Bank Act, its language as a whole could not be more clear: Section 30 does not mention branching; Section 36 expressly governs branching, but does not authorize it in the circumstances presented here. As Justice Scalia has noted, "[w]ords, like syllables, acquire meaning not in isolation but within their context." *Kmart*, 486 U.S. at 319, 108 S. Ct. at 1832 (Scalia, J., concurring in part and dissenting in part). The National Bank Act constitutes a "complete system" for the government of national banks. *Texas & Pac. Ry. Co.*, 291 U.S. at 253, 54 S. Ct. at 417. It is a strange argument that the silence of Section 30 somehow overrides the express language of Section 36.

Even if the plain language of this legislative scheme were not so readily apparent, the Court of Appeals should have considered the legislative history of the National Bank Act in order to discern congressional intent. Absent such an inquiry, a court cannot fulfill its crucial constitutional role to restrain agency action that violates the intent of Congress. *See* Stephen Breyer, *The 1991*

Justice Lester W. Roth Lecture on the Uses of Legislative History in Interpreting Statutes, 65 S. CAL. L. REV. 845, 860-61 (1992).

B. Agencies May Not Resolve Statutory Ambiguities in Violation of Supreme Court Precedent or Usurp Power Expressly Withheld by Congress

Not only has the Comptroller ignored Congress' intent with regard to branch banking, he has also ignored the holdings of this Court vindicating that intent. As discussed above, this Court has held that branching authority cannot be implied. By relying on an implied authority to branch, the Comptroller has undermined the principle of stare decisis — a principle central to a stable and predictable justice system. As this Court has noted, "[O]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131, 110 S. Ct. 2759, 2768 (1990).

Where, as here, an agency supplants a long standing and oft-repeated judicial interpretation of a statute with an interpretation of novel and dubious character, it encroaches upon judicial power in the name of expedience.

> The [agency's] nonacquiescence not only scoffs at the law of this circuit, but flouts some very important principles basic to our American system of government — the rule of law, the doctrine of separation of powers imbedded in the constitution, and the tenet of judicial supremacy laid down

> in *Marbury v. Madison* . . . . The government expects its citizens to abide by the law — no less is expected of those charged with the duty to faithfully administer the law.

Lopez v. Heckler, 713 F.2d 1432, 1441 (9th Cir. 1983) (Pregerson, J., concurring). *Chevron* deference would not be appropriate even in the face of an ambiguous statute where the agency action so clearly conflicts with Supreme Court precedent.

Of critical importance to the issue of deference, Congress expressly chose to withhold from the Comptroller any power to formulate branching policy through rules or regulations. In the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 708, 94 Stat. 132, 188 (codified at 12 U.S.C. §§ 36 and 93a), Congress prohibited the Comptroller from promulgating any rules under Section 36, preferring that the provisions mean what they say. Deference under *Chevron* to an agency interpretation departing from the language of Section 36 is clearly not warranted since Congress specifically chose *not* to delegate such authority. "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649, 110 S. Ct. 1384, 1390 (1990).

It is unreasonable to assume that Congress would explicitly withhold rule-making authority in the area of branching while simultaneously creating in the agency an unaccountable power to institute new branching policies and procedures through implication. Because the Comptroller's decisions conflict with this Court's precedent and because Congress specifically declined to grant the claimed authority to the Comptroller, the Fifth Circuit's

deference to the agency interpretation abandons the essential tenets of the separation of powers.

C. Because the Comptroller's Interpretation is Unreasonable, It is Not Entitled to Deference

This Court has stated that if it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned, the agency view may be disturbed. *Chevron*, 467 U.S. at 845, 104 S. Ct. at 2783; *see also White v. INS*, 75 F.3d 213, 216 (5th Cir. 1996) (agency's interpretation that frustrates the legislative scheme is not entitled to deference). The Comptroller's interpretation violates the paramount policy of competitive equality and undermines the opt-out election envisioned by Riegle-Neal; it clearly would not be sanctioned by Congress.

Moreover, "[a]n agency interpretation . . . which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 263, 115 S. Ct. 810, 817 (1995). The Comptroller's recent reinterpretation of the National Bank Act as allowing retention of interstate branches conflicts sharply with that agency's prior viewpoint, and thus does not merit deference.

For example, the Comptroller's regulations in effect when the Banks' applications were filed directed that "[a] decision on an application [to retain the head office location as a branch in the context of a head-office relocation] will be made in accordance with [12 C.F.R.] §5.30." 12 C.F.R. § 5.40(d)(4) (1995). Section 5.30(a), in turn, stated that the establishment of branches should be

determined in accordance with Section 36, and § 5.30(c)(1) set forth the Comptroller's "policy" to approve branch applications — "*provided* that approval would not violate . . . state law that is incorporated into federal law regarding the establishment of such branches." *Id.* § 5.30(c)(1) (emphasis added).[22]

The Comptroller's present interpretation of branching authority is not long-standing, and was not made concurrently with the enactment of the relevant statutory provisions. Although Section 30 was enacted in 1885, the Comptroller made no public claim of implied authority to retain interstate branches until its decision in *First Fidelity* — more than 100 years later. *See First Fidelity*, *supra* p. 18, at 83,982.

The Comptroller's rationale for the challenged decisions has even mutated throughout this litigation process. Initially, the Comptroller urged that the authority to retain a former main office as a branch was an inherent adjunct of Section 30. In a brief filed in the CNB case, the Comptroller urged that "[W]hen a national bank relocates its main office under section 30, it may continue to operate its existing branches as an implied, but necessary adjunct to the express authority to move the main office."[23] More recently, the Comptroller has recast his argument: He now claims

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[22] Similarly, the Comptroller's current decisions are also at odds with the interpretation of former Comptroller Saxon, who construed Sections 30 and 36 *in pari materia* and opined that a relocation application had been correctly denied where the resulting branching arrangement would offend state law. *See* Saxon Affidavit (Pet. App. N), which was filed in connection with *Traverse City State Bank v. Empire Nat'l Bank*, 228 F. Supp. 984 (W.D. Mich. 1964).

[23] Defendant Comptroller of the Currency's Reply Brief in Support of its Motion to Dismiss or, in the Alternative, For Summary Judgment, and Response to Plaintiff's Cross-Motion for Summary Judgment, at 5.

that because Section 36 does not specifically require divestiture of the preexisting branches, they can be retained. *See* Brief of Appellant Comptroller of the Currency, *Ghiglieri v. Ludwig*, on appeal to the Fifth Circuit.

This Court has signaled that deference to the Comptroller is not appropriate in applying the McFadden Act:

> Nor do these cases [providing that "normally Congress would not want States to forbid, or to impair significantly, the exercise of a power Congress explicitly granted"] control the interpretation of federal banking statutes that accompany a grant of an explicit power with an explicit statement that the exercise of that power is subject to state law. See e.g., 12 U.S.C. § 36(c) (McFadden Act) . . .. Not surprisingly, this court has consistently interpreted those explicit provisions to mean what they say.[24]

Barnett Bank of Marion County v. Nelson, ___ U.S. ___, 116 S. Ct. 1103, 1107 (1996).

The Court of Appeals uncritical deference granted to the Comptroller's rationale ignores this Court's admonition in *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-46, 93 S. Ct. 1773, 1785 (1973) (citations omitted): "[T]he courts are the final authorities on issues of statutory construction . . . and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory

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[24] In support, the *Barnett* Court cited *Plant City* and *Logan*.

mandate or that frustrate the congressional policy underlying a statute."

Judicial review of administrative agencies is particularly essential when the agency in question has been repeatedly criticized by members of Congress for usurping congressional power and aggressively attempting to preempt state law. "[A] pattern has been established by the Comptroller of the Currency which makes the presumption of deference inoperative. He has displayed a clear disregard for the limits of his authority, for other state and federal regulators and for the Congress." Prepared Statement of Chairman D'Amato before the Financial Institutions Subcommittee (May 1, 1997) (Pet. App. M-3).[25]

CONCLUSION

The National Bank Act does not imply branching authority. That authority resides in Section 36, which applies state law limitations to national banks. The Court of Appeals improvidently deferred to the Comptroller and allowed him to nullify Texas' decision not to permit interstate branch banking — a right Congress granted to the states in Section 36, and continued under Riegle-Neal. The decisions below place state-chartered banks at a competitive disadvantage with the Banks, thereby frustrating the congressional policy of competitive equality and violating the constitutionally mandated separation of powers. For these reasons, the petition for a writ of certiorari should be granted.

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[25] *See also* H.R. CONF. REP. No. 651, 103d Cong., 2d Sess. 53-54 (Aug. 2, 1994) (noting the conferees' criticism of the Comptroller for failing to appropriately apply certain state banking laws to national banks) (*see, e.g.*, Pet. App. L-13).

Respectfully submitted this 23rd day of December, 1997.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

CATHERINE A. GHIGLIERI, TEXAS BANKING COMMISSIONER,

Petitioner

v.

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY;
SUN WORLD NATIONAL ASSOCIATION, EL PASO, TEXAS; AND
COMMERCIAL NATIONAL BANK OF TEXARKANA,

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Case Nos. 96-50847 and 96-10818

PETITIONER'S APPENDIX VOLUME I

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79 pp

TABLE OF CONTENTS
APPENDIX

A. *Ghiglieri v. Sun World National Association*, Opinion of the United States Court of Appeals for the Fifth Circuit, Case Nos. 96-50847, 96-50948 (July 22, 1997).

B. *Ghiglieri v. Ludwig*, Opinion of the United States Court of Appeals for the Fifth Circuit, Case No. 96-10818 (October 29, 1997).

C. *Ghiglieri v. Sun World National Association*, Memorandum Opinion and Order, United States District Court for the Northern District of Texas (October 29, 1996).

D. *Ghiglieri v. Ludwig*, Findings of Fact and Conclusions of Law of the United States District Court for the Western District of Texas (May 22, 1996).

E. Decision of the Office of the Comptroller of the Currency on the Applications of Sun World, National Association, El Paso, Texas (August 2, 1996).

F. Decision of the Office of the Comptroller of the Currency on the Applications of Commercial National Bank of Texarkana, Texarkana, Arkansas (March 8, 1995).

G. Denial of Petition for Rehearing and Suggestion for Rehearing En Banc, United States Court of Appeals for the Fifth Circuit (September 25, 1997).

H. 12 U.S.C. § 36.

I. ARK. CODE ANN. § 23-32-1202 (Michie 1994).

J. N.M. STAT. ANN. § § 58-1C-4, 58-1C-5, 58-1C-6, 58-1C-7, 58-1C-8 (1996).

K. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, [H.R. 3841] (later, Pub. L. No. 103-328, 108 Stat. 2338 (September 29, 1994)).

L. Joint Explanatory Statement of the Committee of Conference, H.R. CONF. REP. NO. 651, 103d Cong., 2d Sess. 47 *et seq.* (Aug. 2, 1994).

M. Prepared Statement of Chairman D'Amato before Financial Institutions Subcommittee (May 1, 1997).

N. Affidavit of James J. Saxon.

United States Court of Appeals,
Fifth Circuit.
United States Court of Appeals,
Fifth Circuit.
Nos. 96-50847, 96-50948

Catherine A. GHIGLIERI, in her official capacity
as Texas Banking Commissioner,
Plaintiff -Appellee,

v.

SUN WORLD NATIONAL ASSOCIATION,
El Paso, Texas, et al.,
Defendants,

Sun World National Association,
El Paso, Texas;
Eugene A.Ludwig, in his official capacity as
United States Comptroller of the Currency,
Defendants-Appellants.

July 22, 1997

Appeals from the United States District Court for the Western District of Texas.

Before JOLLY, DUHÉ, and EMILIO M. GARZA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

The Comptroller of the Currency (the "Comptroller") allowed Sun World, National Association ("Sun World") to relocate its main banking office across a state line form Texas to New Mexico. Notwithstanding that Sun World's principal office would now be in New Mexico, the Comptroller further allowed Sun World to maintain its pre-existing branches in Texas, and to establish a new branch in Texas. The Texas Banking Commissioner (the "Commissioner") had other notions and persuaded the district court to enjoin both Sun World and the Comptroller. Sun World and the Comptroller appeal, seeking to have the Comptroller's decision to allow Sun World to operate in both New Mexico and Texas reinstated. The appeal presents a question of statutory interpretation and because the Comptroller's interpretation of the statute he administers is reasonable, we defer to it. We grant the relief requested, vacate the judgment of the district court, and remand for entry of judgment in favor of the Comptroller.

I

A

Sun World is a national banking association that had its main office in El Paso, Texas. In addition to its main office, Sun World operated two branch banks in El Paso.

Sun World decided to move its main office from El Paso, Texas, to Santa Teresa, New Mexico, a distance of less than five miles. To achieve this end, Sun World submitted two applications to the Comptroller in 1996. The first application sought approval to move the main office from Texas to New Mexico and to maintain the pre-existing branches in Texas. The second application sought authorization to establish a new branch at the location of the former main office in Texas. The Commissioner objected to both applications. The Comptroller subsequently approved both applications, and Sun World operated in both states until enjoined by the district court.

B

The Commissioner filed this action in the district court(1) seeking to have the decision of the Comptroller set aside, to have Sun World enjoined from conducting interstate banking operations and to have the Comptroller enjoined from approving any further applications of this type.

All parties filed motions for summary judgment. The district court heard arguments on the motions and granted the Commissioner's motion. The court rejected the Commissioner's argument that Sun World could not relocate its main office across a state line. The court, however, held that Sun World could not retain its Texas branches following relocation to New Mexico and that, consequently, neither could Sun World establish a new branch at the site of its former main office in Texas. Sun World and the Comptroller appeal.

II

A

Resolution of this appeal requires us to examine the provisions of and the interplay between two sections of a federal statute. (2) Section 30 effectively provides that Sun World can change the location of its main office to any location within thirty miles of El Paso upon the approval of the Comptroller and two-thirds of it shareholders. (One paragraph of the section relates specifically to the retention of branches after an interstate move, but is irrelevant to our case because it is applicable only to moves occurring after May 31, 1997.) Section 36 sets forth the requirements for the establishment of new branch banks. (Two paragraphs of § 36, which provide specific guidelines for the retention of branch banks upon relocation of a main branch across state lines, are also effective only with respect to banks relocating after May 31, 1997, and therefore inapplicable to this case.)

The Comptroller determined that under § 30 Sun World could relocate its main branch to New Mexico. The Comptroller further determined that because the move occurred before June 1, 1997, Sun World could retain its existing branches in Texas. The Comptroller then decided that § 36 authorized Sun World to create a new branch at the site of the former main office. The district court disagreed. It held that, although Sun World could move its main office to New Mexico under § 30(b), (3) it could not continue to operate the branches remaining in Texas. This conclusion--that Sun World could exist only in New Mexico--necessarily led to the holding that a new branch could not be established in Texas because such branching was not permitted under New Mexico banking law. We now turn to the task of resolving the questions of statutory interpretation posed by this appeal.

B

(1)

In this action, the Commissioner challenges the Comptroller's decision pursuant to the Administrative Procedures Act; we therefore review the decision of the Comptroller de novo to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see Louisiana Envtl. Soc'y v. Dole, 707 F.2d 116, 119 (5th Cir. 1983).

The Supreme Court has set out the analysis to be applied in reviewing an agency's interpretation of the statute it administers. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 841-43, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). Chevron's analysis applies to the case before us because the Comptroller is charged with the administration of the banking laws at issue. Smiley v. Citibank (South Dakota), N.A., --- U.S. ----, ----, 116 S.Ct. 1730, 1732, 135 L.Ed.2d 25 (1996). The Supreme Court instructed as follows:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron at 842-43, 104 S.Ct. at 2781-82. In reaching a determination whether Congress has spoken directly on an issue, courts are free to consider both the plain language and meaning of the statute and any pertinent legislative history. Doyle v. Shalala, 62 F.3d 740, 745 (5th Cir. 1995). The court should use traditional tools of statutory construction, and if the court can discern that Congress intended to address the precise question, then that intention must be given effect. Chevron at 843 n. 9, 104 S.Ct. at 2781 n. 9. If, however, the statute is silent on the precise issue then the agency's interpretation should be given "controlling weight." See NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 255-59, 115 S.Ct. 810, 813-14, 130 L.Ed.2d 740 (1995). In such a case, the issue before the court "is not whether [the agency's interpretation] represents the best interpretation of the statute, but whether it represents a reasonable one." (4) Smiley, at ----, 116 S.Ct. at 1735.

We now apply these principles of construction to the statutes before us today.

(2)

(a)

First, we address whether, upon relocation of its main office to New Mexico, Sun World was permitted to retain its pre-existing branches in Texas. We initially look to the statute. The authority for the relocation of Sun World's main office from El Paso to Santa Teresa is § 30(b). The only relevant restrictions imposed by that section are that the new site be within thirty miles of the original site, and that bank obtain the approval of the shareholders holding at least two-thirds of its stock and that a certificate of approval issue from the Comptroller.

Thus, the Comptroller argues that because there is no statutory language requiring divestiture of existing branches upon relocation of the main office the statute is clear on this issue. He argues that the absence of any such requirement indicates that Congress did not intend to affect the retention of branch banks upon relocation of the bank's main office. The Commissioner counters that the operation of branches--in all situations--is governed solely by § 36, and argues that there is no authority found in § 36 that would allow Sun World to retain its pre-existing branches upon relocation.

Neither party persuades us that Congress has clearly spoken to the precise issue before us today. Indeed it is plain, we think, that the statute is silent on this point. It is obvious that § 30 does not speak to the question of retention of branches after relocation. Although § 36 addresses branch banking, it fails completely to speak to the retention of branches upon relocation of the bank's main office. Section 36(a) speaks only to retention of branches owned in 1927, 36(b) speaks only to the retention of branches upon conversion of a state bank, and 36(c) speaks only to the establishment of new branches. As we have noted earlier, § 36(e) speaks to this precise question, but that section is effective only with respect to relocations occurring after May 31, 1997, and is therefore not applicable to our case. In short, both sections 30 and 36 are silent as far as our case today is concerned.

(b)

Having concluded that Congressional intent is not expressed on this specific issue, we turn now to determine whether the interpretation advanced by the Comptroller is a permissible one. See Chevron at 841-43, 104 S.Ct. at 2781; Smiley, at ----, 116 S.Ct. at 1735. For the reasons that follow, we conclude that the Comptroller reasonably interpreted the statutes.

Initially, the Comptroller's position is supported because, although there are specific enumerated conditions that must be satisfied before relocation of a main office, Congress did not provide that lawfully established pre-existing branches must be forfeited. In effect, the Commissioner's position would result in a deprivation of the lawfully acquired property interests of Sun World without express statutory authority. We doubt Congress would have intended such an extreme consequence in implied or oblique terms.

Indeed, when Congress did address the matter, it did so in express words. Sections 30(c) and 36(e)--added by the Riegle-Neal Act in 1994--specifically condition the retention of existing branches after out-of-state relocation of a main office upon the satisfaction of certain conditions, which focus on state law. See 12 U.S.C. §§ 30(c), 36(e). These provisions apply only to moves occurring after May 31, 1997, and, thus, have no direct impact on the case before us today. The addition of these sections, however, indirectly supports the Comptroller's position. The Supreme Court recently has noted that the imposition of a Congressional limitation on a national bank's authority is logical only if the banks already had the authority. See NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257-59, 115 S.Ct. 810, 814, 130 L.Ed.2d 740 (1995). In other words, it makes on sense to impose conditions on the ability to retain existing branches following relocation of a main office unless that ability already existed in some fashion.(5)

The Conference Report accompanying the adoption of the Riegle-Neal Act also lends credence to the interpretation adopted by the Comptroller. The Report contained the following:

The Comptroller of the Currency (OCC) has used the 30 mile relocation provision of the National Bank Act ... to approve several transactions which have permitted national banks to move their main offices to other States but to retain branches in the States left by the Main offices. [(6)] Section 102(b)(2) amends the provision so that after June 1, 1997, a national bank relocating its main office to another state may maintain its branches in the first state only if those branches could have been established by a bank with its home State in the new State....

The Conferees are aware of the OCC procedures in permitting relocation across state lines. The Conferees concur with those procedures, including the application of appropriate State law and authority. [(7)] The Conferees expect the OCC to continue to follow those procedures until the provisions of Title I become fully applicable on June 1, 1997.

H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 57 (Aug. 2, 1994) (footnotes added). This statement suggests that Congress indeed viewed the practice of allowing retention of branches upon relocation under § 30(b) favorably and did not intend to end the practice until the effective date of the Riegle-Neal amendments.

We have found no indication, nor has the Commissioner provided us with any evidence, that the interpretation adopted by the Comptroller his unreasonable. Given that Congress has addressed branch retention in only two ver limited circumstances--neither of which apply to main office relocations--we conclude that it is reasonable under § 30 and § 36 for the Comptroller to allow banks relocating before June 1, 1997, to retain their lawfully established pre-existing branches in their former home state.

The decision of the Comptroller of Sun World's first application therefore is reinstated; Sun World will be permitted to relocate its main office from El Paso, Texas, to Santa Teresa, New Mexico, and to continue to operate its two pre-existing branches in El Paso, Texas. We turn now to the second application and determine

whether Sun World should be allowed to open a new branch at the site of its former main office in El Paso.

(3)

There is no dispute that this second question is governed by § 36(c); therefore, Sun World may open a new branch at the site of its former main office in accordance with the following:

A national banking association may ... establish and operate new branches: (1) Within the limits of the city ... in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question....

12 U.S.C. §36(c) (emphasis added). First, Sun World first must be "situated" in El Paso, Texas—the city in which it wishes to establish a new branch. Second, the banking laws of Texas—the law of the state in question—must be broad enough to allow a State bank located in El Paso to establish a new branch in the city. The Comptroller held that for purposes of this section, Sun World was situated in both El Paso, Texas, and Santa Teresa, New Mexico, and therefore could establish a new branch in El Paso because such a branch would be authorized by the state law of Texas.

The Comptroller relied upon the interpretation of § 36 established by Seattle Trust and Savings Bank v. Bank of California, 492 F.2d 48 (9th Cir. 1974), cert. denied, 419 U.S. 844, 95 S.Ct. 77, 42 L.Ed.2d 72 (1974), to resolve this question. Seattle Trust involved a bank with its corporate headquarters in California and legally established branches in Seattle, Washington. The bank sought to establish a new branch in Seattle, and the Comptroller approved the application. Id. at 49. On appeal, the Ninth Circuit affirmed the decision of the Comptroller, holding that for purposes of § 36(c) the bank was situated in both California—the site of its corporate headquarters—and Washington—the site of its legally established branches. Id. at 51-52. The court then held that, because the bank

was situated in Washington, that state's branching law controlled the question whether a new branch could be established in Seattle. Id. at 52.

We agree with the Comptroller that Seattle Trust is applicable to the facts before us today. As a result of our holding that Sun World is authorized to relocate its main branch to Santa Teresa, New Mexico, and to retain its branches in El Paso, Texas, Sun World occupies a position identical to the one occupied by the bank in Seattle Trust. In point of fact, Sun World actually is situated in both New Mexico and Texas. We therefore conclude that the Comptroller's decision that Sun World was situated in El Paso for the purposes of § 36(c) is a reasonable interpretation of the statutory terms. Texas branching law therefore applies to determine whether Sun World may open a new branch in the city. Under that law, a State bank may "establish and maintain branches at any location" without geographic limit. See Tex.Rev.Civ. Stat. Ann. art. 342-3.201(a) & 342-3.203 (West Supp. 1996). Sun World is entitled under § 36(c) to that same grant of branching authority and, thus, can establish a new branch at the sit of its former main office. In short, we reinstate the Comptroller's decision on Sun World's second application, which sought authorization to establish a new El Paso branch.

III

In conclusion, we find that the statutes at issue do not address the question of branch retention after relocation under § 30(b) to another state of a main office. Under Chevron, we give deference to the Comptroller's interpretation of the statutes if that interpretation is permissible. Finding the interpretation permissible, we accordingly defer and reinstate the decision of the Comptroller allowing the retention of the branches. With respect to Sun World's second application, we are persuaded by the rationale of Seattle Trust that the Comptroller's interpretation and application of the statute is reasonable and hold that after the relocation, Sun World is situated in both El Paso, Texas, and Santa Teresa, New

Mexico, because it has retained its Texas branches. Thus, the creation of a new branch in El Paso, Texas is governed by Texas law. Texas law allows State banks to branch at-will; therefore, the new branch is legally authorized under the portion of § 36(c) incorporating state law restrictions.

The decision of the district court is therefore VACATED and the case will be REMANDED to the district court for entry of judgment in favor of the Comptroller.(8)

VACATED and REMANDED for entry of judgment.

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1. The Commissioner initially instituted the district court action against Sun World prior to the Comptroller's decisions on the applications. After the Comptroller ruled on the applications, the complaint was amended to include the Comptroller as a party.

2. The statutes that govern this appeal are 12 U.S.C. § 30 and § 36. These statutes provide, in relevant part:

> § 30. Change of name or location
>
> (b) Location change
>
> Any national banking association, upon written notice to the Comptroller of the Currency, may change the location of its main office to any authorized branch location within the limits of the city, town, or village in which it is situated, or, with a vote of shareholders owning two-thirds of the stock of such association for a relocation outside such limits and upon receipt of a certificate of approval from the Comptroller of the Currency, to any other

location within or outside the limits of the city, town, or village
in which it is located, but not more than thirty miles beyond such limits.

(c) Coordination with section 36 of this title

In the case of a national bank which relocates the main office of such bank from one State to another State after May 31, 1997, the bank may retain and operate such branches within the State from which the bank relocated such office only to the extent authorized in section 36(e)(2) of this title.

12 U.S.C. § 30.

§ 36. Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch
or
branches are the following:

(a) Lawful and continuous operation

A national banking association may retain and operate such branch or branches as it may have had in lawful operation on February 25, 1927, and any national banking association which continuously maintained and operated not more than one branch for a period of more than twenty-five years immediately preceding February 25, 1927, may continue to maintain and operate such branch.

(b) Converted State banks.

(c) New branches

A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by the language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

(e) Exclusive authority for additional branches

(1) In general

Effective June 1, 1997, a national bank may not acquire, establish, or operate a branch in any State other than the bank's home State ... or a State in which the bank already has a branch unless the acquisition, establishment or operation of such branch in such State by such national bank is authorized under this section or section 1823(f), 1823(k) or 1831(I) of this title.

(2) Retention of branches

In the case of a national bank which relocates the main office of such bank from one State to another State after May 31, 1997, the bank may retain and operate branches within the State which was the bank's home State ... before the relocation of such office only to the extent the bank would be authorized, under this section or any other provision of law referred to in paragraph (1), to acquire,

> establish, or commence to operate a branch in such State if—
>
> (A) the bank had no branches in such State; or
>
> (B) the branch resulted from—
>
> (I) an interstate merger transaction approved pursuant to section 1831(u) of this title; or
>
> (II) a transaction after May 31, 1997, pursuant to which the bank received assistance from the Federal Deposit Insurance Corporation under section 1823(c) of this title.

12 U.S.C. § 36.

3. This holding is not seriously challenged by the Commissioner on appeal, and, to the extent that it is challenged, the appeal is without merit in the light of the express language of section 30(b) establishing a thirty-mile limitation on relocation without reference to state lines. Notably, a limitation requiring that the move be "within the same state" was deleted from the statute in 1959.

4. When faced with a question not addressed specifically by Congress, the Supreme Court has noted that

> It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering. As we observed only last Term, that practice extends to the judgments of the Comptroller of the Currency with regard to the meaning of the banking laws.

Smiley, at ——, 116 S.Ct. at 1733 (internal citations omitted).

5. We reject the Commissioner's argument that the addition of §§ 30(c) and 36(e) was a grant of power to the Comptroller and national banks never before enjoyed. This argument is nonsensical because, if carried to its conclusion, no relocating national bank previous had the authority to retain its pre-existing branches even if it simply moved its main office across the street. Further, under the Commissioner's argument, after June 1, 1997, only a bank relocating across state lines can retain branches under certain conditions while a bank relocating in the same state—which the new amendments do not address—apparently must divest its branches and apply to re-establish them under § 36(c). The obvious weakness of this interpretation stands in sharp contrast to the interpretation urged by the Comptroller: Until June 1, 1997, all banks may relocate in accordance with § 30(b) without divestiture of their lawfully established pre-existing branches; then, after that date, interstate relocations will be limited by the conditions of §§ 30(c) and 36(e). In any event, our inquiry is not which interpretation is preferred, but whether the Comptroller's interpretation is permissible. We think that it is indeed permissible.

6. These decisions are the Decision on the Applications of American Security Bank, N.A., Washington, D.C., and Maryland National Bank, Baltimore, Maryland (OCC Corporate Decision No. 94-05, Feb. 4, 1994), reprinted in [1993-94 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89, 695 and the Decision on the Applications of First Fidelity Bank, N.A., Pennsylvania, Philadelphia, Pennsylvania, and First Fidelity Bank, N.A., New Jersey, Newark, New Jersey (OCC Corporate Decision No. 94-04, Jan. 10, 1994), reprinted in [1993-94 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶89, 644. Both decisions relied upon the provisions of § 30(b) to conclude that a bank could retain its pre-existing branches after relocating its main office out-of-state, although both also provided alternative bases for the retention of the branches.

7. Both decisions referred to by the legislative history, see supra note 6, involved questions of state law in the course of

determining whether a new branch could be opened in the former home state. See 12 U.S.C. § 36(c) (relying on state law to determine ability to open new branch).

8. Our holding today renders unnecessary any consideration of Sun World's appeal from the district court's award of attorneys' fees to the Commissioner. See Ghiglieri v. Sun World, N.A., appeal docketed, No. 96-50948 (5th Cir. Dec. 9, 1996), consolidated for decision with No. 96-50847 (5th Cir. May 12, 1997).

United States Court of Appeals,

Fifth Circuit.

Nos. 96-10818.

Catherine A. GHIGLIERI, in her official capacity as Texas Banking Commissioner, Plaintiff-Appellee,

v.

Eugene A. LUDWIG, in his official capacity as United States Comptroller of the Currency; Commercial National Bank of Texarkana, Texarkana, Texas, Defendants-Appellants.

October 29, 1997

Appeals from the United States District Court for the Northern District of Texas.

Before REAVLEY, JOLLY and BENAVIDES, Circuit Judges.

PER CURIAM:

The questions presented in this appeal are whether a national bank that relocated its main office across state lines before June 1, 1997, could retain its pre-existing branches in its former home and whether it could establish a new branch at the site of its former main office. The district court concluded that Commercial

National Bank of Texarkana could do neither. In light of this court's recent decision in *Ghiglieri v. Sun World National Association*, 117 F.3d 309 (5th Cir. 1997) and Arkansas law, we vacate and remand for entry of judgment in favor of appellants.[1]

I.

In 1994, Commercial National Bank of Texarkana ("CNB" or "the bank") applied to the Office of the Comptroller of the Currency ("the Comptroller" or "the OCC") to relocate its main office from Texarkana, Arkansas to Texarkana, Texas. At that time, the bank also operated two branch offices and an automated teller machine in Texarkana, Arkansas, and a third branch office in Fouke, Arkansas. When the bank requested approval for the relocation of its main office, it simultaneously sought the Comptroller's authorization to establish a new branch at its soon-to-be former main office in Texarkana, Arkansas. The Comptroller approved both applications over the objections of the Texas Banking Commissioner ("the Commissioner") and the Arkansas State Bank Department.[2]

The Commissioner brought suit against the Comptroller and CNB in federal district court, seeking review of the Comptroller's decision and asking for declaratory and injunctive relief. All parties filed motions for summary judgment. The Commissioner moved for summary judgment on the grounds that (1) CNB could not relocate its main office across state lines, even if the move was within the 30-mile limit established by 12 U.S.C. § 30(b); (2) procedural defects in CNB's applications should have defeated their approval; (3) CNB's temporary main office was actually a branch office; (4) CNB could not retain its branches after relocating its main office to Texas; and (5) CNB could not create a new branch at its former main office in Arkansas. The district court granted summary judgment to the Commissioner on the fourth and fifth grounds. The district court's order set aside the Comptroller's decisions with respect to the retention of CNB's pre-existing

branches and its establishment of a new branch at the site of its former main office; enjoined CNB's banking operations in the State of Texas; and enjoined the Comptroller from approving similar relocation applications.

II.

Whether a national bank that relocated its main office across state lines before June 1, 1997, could retain its pre-existing branches in its former home state was resolved squarely by this court in *Ghiglieri v. Sun World*, 117 F.3d at 313-15. In that case, we concluded that the National Bank Act, 12 U.S.C. § 21 *et seq.*, is silent with respect to the retention of branches following a main office relocation and that the Comptroller's interpretation of the statute to allow retention of pre-existing branches was reasonable. Accordingly, under the Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), we deferred to the Comptroller's interpretation. We are bound by our holding in *Sun World*. Accordingly, CNB can relocate its main office from Texarkana, Arkansas to Texarkana, Texas and retain its pre-existing Arkansas branches, and the district court erred in concluding to the contrary.

III.

We next address the issue of whether CNB could establish its former main office as a new branch. Section 36(c) governs the resolution of this issue. *See* 12 U.S.C. § 36(c); *Sun World*, 117 F.3d at 315. Under that provision, a national bank can establish and operate a new branch "[w]ithin the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question." 12 U.S.C. § 36(c)(1). Under this court's analysis in *Sun World*, CNB is situated in both Texas and Arkansas, and the creation of a new branch in Texarkana, Arkansas is governed by the law applicable to Arkansas state

banks. 117 F.3d at 316 (citing *Seattle Trust & Sav. Bank v. Bank of Calif.*, 492 F2d 48 (9th Cir. 1974).

The district court concluded that CNB could not establish its former main office as a branch office under Arkansas law. This conclusion was based in part on the premise that CNB was not entitled to retain its pre-existing Arkansas branches after relocating its main office. Our decision in *Sun World* established that that premise is faulty and that the bank can indeed retain its pre-existing branches. But that does not end the inquiry in the Comptroller's favor. We still must determine whether Arkansas branching law would allow a state bank in CNB's position to establish a new branch in Texarkana, Arkansas.

The Comptroller concluded that two provisions of Arkansas law permitted the establishment of CNB's former main office as a new branch. The first allows an Arkansas state bank to establish a branch "anywhere within the county in which the establishing bank's principal banking office is located." Ark. Code Ann. § 23-32-1202(b)(1).

The Comptroller relied on the Third Circuit's reasoning in the *Seattle Trust* case to conclude that the county of CNB's "principal banking office" for the purpose of Arkansas branching law was Miller County, Arkansas, where CNB's former main office and pre-existing branches were located. In *Seattle Trust*, the Third Circuit reviewed the Comptroller's construction of a Washington branching statute that mirrors Section 23-32-1202(b)(1) of the Arkansas Code. 492 F.2d at 52. The Washington statute restricted a state bank to branching in "the city or town in which its principal place of business is located...." *Id.* the court concluded that a national bank's principal place of business under this statute was Seattle, Washington, even though the bank's corporate headquarters were in San Francisco, California. 494 F.2d at 52-53. The Third Circuit agreed with the Comptroller that "principal place of business," as used in Washington banking law, should be construed to mean "the principal place of business within the State of

Washington." *Id.* at 52. As the *Seattle Trust* court explained, "There is no such thing as a Washington state bank with its principal place of business outside Washington." *Id.* at 52-53. The Comptroller in this case reasoned that there is no such thing as an Arkansas bank with its principal banking office outside of Arkansas, and, accordingly, that Miller County, Arkansas, where all CNB's facilities were located before the main office relocation, must be the location of its principal banking office within Arkansas.

We need not, however, adopt the Third Circuit's analysis on this point because, as the Comptroller concluded, the propriety of the conversion of CNB's former main office into a branch office is answered plainly in Section 23-32-1202(b)(2) of the Arkansas Code, which provides:

A bank which relocates its principal banking office may continue to use its former principal banking office location as a full service branch and customer-bank communication terminal so long as the use as banking facility is uninterrupted.

Ark. Code Ann. § 23-32-1202(b)(2). Because the Comptroller on March 8, 1995, simultaneously allowed CNB to relocate its main office to Texarkana, Texas and to establish its former main office in Arkansas as a branch, there is on question that the use of this office as a banking facility was uninterrupted. The district court should have upheld the Comptroller's approval of the establishment of a new branch at the site of CNB's former main office based on Section 23-32-1202(b)(2).

IV.

Accordingly, we VACATE the decision of the district court and REMAND to the district court for entry of judgment in favor of the Comptroller and CNB.

REAVLEY, Circuit Judge, concurring:

I concur in the judgment because I accept the construction of 12 U.S.C. § 36(c) to permit the establishment of branches within Arkansas when branches, though now not the home office, have been located there. The statute allows this "within the state in which said association is situated...." A prior panel has agreed with the Ninth Circuit and the Comptroller that this describes a situated branches as well as main office. I do not disagree and can read the statute to allow branches to be retained where new branches could be established. My esteemed colleagues are in error, however, when they say that § 36 is silent with respect to the retention of branches after relocation of the main office. Section 36 begins: "The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:" We are required to find the authorization in the language of § 36(c). Because I agree that we can, I concur.

1. The Commissioner's motion to strike the attachments to the amicus curiae brief of the Consumer Bankers Association and Bankers Roundtable is granted.

2. The Arkansas State Bank Department was not a party to the district court proceedings nor is it a party on appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

CATHERINE A. GHIGLIERI, Texas Banking Commissioner, Plaintiff,	§	
v.	§	EP-96-CA-324-DB
SUN WORLD, NATIONAL ASSOCIATION and EUGENE A. LUDWIG, Comptroller of the Currency for the United States, Defendants.	§	

MEMORANDUM OPINION AND ORDER

On this day, the Court considered the various Motions and Cross-Motions for Summary Judgment filed by each of the parties to the above-captioned cause. All Motions and Cross--Motions were timely filed. On Thursday, September 5, 1996, the Court heard the arguments of the parties. After due consideration, the Court is of the opinion that this action should be resolved as set forth below.

FACTS

Sun World, National Association ("Sun World") is a national bank chartered by the Office of the Comptroller of the

Currency of the United States ("OCC") under the National Bank Act. 12 U.S.C. § 21 *et. seq.* Until August 2, 1996, Sun World operated its main office and two branches in El Paso, Texas. On that date, the OCC authorized Sun World to: (1) relocate its main office from El Paso, Texas, to Santa Teresa, New Mexico; (2) establish and operate a new branch at its former main office site in El Paso, Texas; and, (3) retain its two existing branches in El Paso, Texas.

STANDARD OF REVIEW

"The Comptroller has wide discretion in the field of national banking and the exercise of his discretion will not be disturbed except when the exercise is arbitrary, capricious, or contrary to law." *First Nat'l Bank of La Marque v. Smith*, 610 F.2d 1258, 1264 (5th Cir. 1980) (citing *Ramapo Bank v. Camp*, 425 F.2d 333, 341 (3rd Cir.), *cert. denied*, 400 U.S. 828 (1970); *First Nat'l Bank of Bellaire v. Comptroller of the Currency*, 697 F.2d 674, 680 (5th Cir. 1983); 5 U.S.C § 706(2)(a). The Comptroller's determination must be upheld if it is a "permissible construction" of the National Bank Act. *Department of Banking & Consumer Finance v. Clarke*, 809 F.2d 266, 269 (5th Cir.), *cert. denied*, 107 S.Ct. 3240 (1987) (citing *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Texas v. U.S.*, 756 F.2d 419 (5th Cir.), *cert. denied*, 106 S.Ct. 129 (1985).

The Court notes that the decisions of the Comptroller are not unfettered. "The Comptroller must be subordinate to the law from which he received his authority, and is subject to the limitations imposed by that law.... Though he may exercise the discretion the expertise of his office affords him, the congressional grant of authority does not empower arbitrary and

capricious action, nor does it contemplate abuses of that discretion." *Bellaire*, 697 F.2d at 680.

The arbitrary and capricious standard applies to factual controversies. *Seattle Trust & Sav. Bank v. Bank of California, N.A.*, 492 F.2d 48, 50 (9th Cir.), *cert. denied*, 95 S.Ct. 77 (1974). However, when the issue is whether the Comptroller has acted within the limitations imposed upon him by federal and state law, the standard of review is *de novo*. *Id.; Ghiglieri v. Ludwig*, WL 315947 (N.D. Tex. 1996) (citing *Washington ex rel. Edwards v. Heimann*, 633 F.2d 886, 888, n. 1, (9th Cir. 1980). (The district court's review of the Comptroller's decision is a *de novo* determination of the legal issues involved). Both Defendants asserted numerous times, in their briefs and in oral argument, that the courts owe deference to a decision of the OCC pursuant *to Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and *Smiley v. Citibank*, __ U.S. __, 116 S.Ct. 1730 (1996). This Court agrees with Defendants as to the deferential standard, but notes that "while administrative agencies are expert in technical problems within their jurisdiction, they enjoy no special skill in statutory construction, an area in which the courts are the final authority." *Western Coal Traffic League v. U.S.*, 694 F.2d 378, 383-84 (5th Cir.), *on reh'g*, 719 F.2d 772 (5th Cir. 1982), *cert. denied*, 104 S.Ct. 2160 (1984).

STANDARD FOR SUMMARY JUDGMENT

The standard for granting Summary Judgment pursuant to FED. R. CIV. P. 56(c) and the laws of the United States require that there be no genuine issue of material fact. *See Celotex Corp. v. Catrell*, 477 U.S. 317, 106 S.Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505

(1986); *Matsushita Elec. Industr. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986); *Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir. 1994)(en *banc)*. Federal Rule of Civil Procedure 56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegation or denials of the adverse party's pleadings, but ... must set forth specific facts showing that there is a genuine issue for trial.

After a careful review of all available summary judgment evidence, the Court is of the opinion that Plaintiff's Cross-Motion for Summary Judgment should be granted, as Defendants are unable to show that there is a genuine issue of material fact regarding the claims set forth below.

DISCUSSION

Defendants first assert that the OCC's approval of Sun World's relocation of its main office to New Mexico was clearly lawful. The Court does not find this point to be in dispute. Under Section 30 of the National Bank Act, a national bank enjoys limited express authority to relocate its main branch.[1]

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[1]Title 12 U.S.C. § 30(b) reads as follows:

> Any national banking association, upon written notice to the Comptroller of the Currency, may change the location of its main office to any authorized branch location within the limits of the city, town, or village in which it is situated, or, with a vote of shareholders owning two-thirds of the stock of such association for a relocation outside such limits and upon receipt of a certificate of approval from the Comptroller of the Currency, to any other location within or outside the limits of the city, town,

Section 30(b) was amended in 1959 to delete a "within the same state" restriction on main office relocations.[2] *McEnteer v. Clarke,* 644 F. Supp. 290, 292 (E.D. Pa. 1986). Absent such a restriction, it seems relatively obvious that Sun World's relocation of its main office across the Texas/New Mexico state line was authorized under Section 30(b).

Therefore, the Court finds that the primary issues in this case are: (1) whether there is any authority available under the National Banking Act, either express or implied, which would allow Sun World to retain its Texas branches after relocating its main office to Santa Teresa, New Mexico; and, (2) whether there is any authority available under the National Bank Act which would allow Sun World to establish a "new" branch office at its former main office. This Court is of the opinion that no such authority exists to support either proposition.

1. No Implied or Express Authority to Retain Branches

In 1994, Congress amended the National Banking Act to include Section 30(c), which specifically deals with the issue of branch retention after a national bank relocates its

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or village in which it is located, but not more than thirty miles beyond such limits.

[2]Amended 1959, Pub. L. No. 86-230, § 3, 73 Stat. 457 (codified as amended at 12 U.S.C. § 30(b)(West Supp. 1996)).

main office across state lines.[3] Section 30(c) states that a national bank may retain and operate branches within the State from which the bank relocated its main office only to the extent authorized by Section 36(e)(2).[4]

The passage of Section 30(c) represents the first time that Congress authorized a national bank to retain branches in the former home state in connection with an interstate

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[3]Amended 1994, Pub. L. No. 103-328, § 102(b)(2), 108 Stat. 2350 (codified as amended at 12 U.S.C. § 30(c)) which reads as follows:

> In the case of a national bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State from which the bank relocated such office only to the extent authorized in Section 36(e)(2) of this Title.

[4]Section 36(e)(2) reads as follows: (emphasis added)

> In the case of a national bank which relocates the main office of such bank from 1 State to another State ***after May 31, 1997***, the bank may retain and operate branches within the State which was the bank's home State (as defined in subsection (g)(3)(B) of this section) before the relocation of such office only to the extent the bank would be authorized, under this section, or any other provision of law referred to in paragraph (1), to acquire, establish, or commence to operate a branch in such State if:
>
> (A) the bank had no branches in such State; or
>
> (B) the branch resulted from -
>
> (i) an interstate merger transaction approved pursuant to section 1831u of this title; or
>
> (ii) a transaction after May 31, 1997, pursuant to which he bank received assistance from the Federal Deposit Insurance Corporation under section 1823(c) of this title.

main office relocation.[5] After May 31, 1997, a national bank may retain branches in its former home state unless a state passes a law specifically prohibiting interstate branches or elects not to "opt in" pursuant to Section 36(g). Therefore, the lawfulness of a national bank's retention of branches after an interstate relocation is dependent on state law. Texas is, at this time, the only state which has not "opted in" pursuant to Section 36(g). *See* TEX. REV. CIV. STAT. ANN. Art. 489f (Vernon Supp. 1996). As a result, nothing will change in Texas after the amendments to Sections 30 and 36 become effective on June 1, 1997.[6]

Defendants argue that nothing in Section 30 remotely suggests that a national bank, which has relocated its main office across state lines, is required to divest itself of its existing branches after the relocation. Further, Defendants assert that a national bank under such circumstances enjoys an implied authority to operate branches in the former state as a necessary adjunct to the express authority to relocate the main office. While the Court agrees that the plain language of Section 30 does not touch on any divestiture

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[5]The Court notes that the National Bank Act does allow for the retention of branches in two limited situations. *See* 12 U.S.C. §§ 36(b)(1) and 36(b)(2). Neither situation is applicable to the case at bar.

[6]The OCC urges that Congress intended an implied recognition of retention of existing branches until May 31, 1997, presumably based upon the inclusion of a specific date in the future. This argument lacks merit. The actions of the OCC cannot be justified pursuant to a statute which is not yet effective.

requirement, there exists no implied authority by which a national bank may continue to operate its existing branches after such a relocation of its main office across state lines.

Defendants point the Court to several cases to support their "implied authority" proposition, most notably the Third Circuit Court of Appeals case of *Ramapo Bank v. Camp*, 425 F.2d 333. In *Ramapo*, the court held that Section 30 controls a national bank's main office relocation regardless of the impact of state banking laws. That holding essentially allowed a national bank to relocate its main office *within the same state*, and to retain its former main office as a branch, under circumstances where such an occurrence would have been prohibited by Section 36. The case at bar deals with a national bank association which desires to retain branches in its former home state after relocating its main office *to another state*.

The retention of branches by a national bank which has relocated its main office from one state to another is specifically addressed in the National Bank Act. The plain language of the Act sets forth the method by which branches may be retained under the circumstances involved in this case. This Court finds that Section 30 must be read in conjunction with, and is limited by, Section 36. *See First Nat'l Bank of Southhaven v. Camp*, 333 F.Supp. 682 (N.D. Miss.) *aff'd w/out opinion*, 467 F.2d 121 (5th Cir. 1971); *Ghiglieri v. Ludwig*, WL 315947 (N.D. Tex. 1996); *National Bank of Marion v. The Van Buren Bank*, 418 F.2d 121 (7th Cir. 1969); *Burke v. Ludwig, Civ.* No. 3:96CV0579(AVC)(D. Conn. 1996). Neither Section 30

nor Section 36 confer any additional authority to branch or retain branches which is not specified in the statute. In other words, there exists no authority, either express or implied, to support the Defendants' proposition.

2. No Authority to Establish Former Main Office as a "New" Branch

As noted earlier, this Court is of the opinion that no authority exists which would allow Defendant Sun World to establish a "new" branch at its former main office in El Paso, Texas, after the relocation of the main office to Santa Teresa, New Mexico.

The establishment of new branches is governed by 12 U.S.C. § 36(c). Not coincidentally, this is the section on which the Comptroller based his authorization of the establishment of Sun World's former main office as a "new" branch. Section 36(c) allows the establishment of new branches with the approval of the Comptroller:

> ...at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

12 U.S.C. § 36(c)(2). In other words, a national bank is only permitted to branch to the extent that a state allows

branch banking for its own banks. *State v. Clarke,* 690 F. Supp. 573 (W.D. Tex. 1988); *First Nat'l Bank v. Walker Bank & Trust Co.,* 385 U.S. 252 (1966); *Washington ex rel. Edwards v. Heimann,* 633 F.2d 886, 889 (9th Cir. 1980). Federal law determines what constitutes a branch bank, but state law determines when, where, and how a national bank may branch, or if it may branch at all. *Heimann,* 663 F.2d at 889, 890. In deciding whether to approve a national bank's branch application, the Comptroller must consider all relevant state laws and comply with any requirements established by state statutes. *Id.*

Because the Court has already determined that the relocation of Sun World's main office from El Paso, Texas, to Santa Teresa, New Mexico, was proper, the question now is whether a New Mexico bank may branch back to Texas. The answer to that question is no.

Sections 30 and 36 of the National Bank Act must be considered jointly in order to test the good faith nature of the simultaneous applications to relocate and to branch. *First Nat'l Bank of Southhaven v. Camp,* 333 F. Supp. at 689. In *Southhaven,* the court stated that competitive equality between national and state banking systems "looks to substance and not form". *Id* at 690. *See also Jackson v. First Nat'l Bank of Gainesville,* 430 F.2d 1200 (5th Cir. 1970), *cert. denied,* 401 U.S. 947 (1971). The *Southhaven* court further held that the Comptroller would be justified in concluding that "a principal motivation" for relocating the bank's main office was to enable the bank to "accomplish branching under conditions contrary to state law." *Id.* In

this instance, the relocation of the main office was proper. However, a New Mexico bank cannot branch back to Texas under either Texas or New Mexico law.

Texas law prohibits a New Mexico bank from branching back into Texas. Texas state bank home offices and branches are governed by TEX. CIV. STAT. ANN. art. 342-3.201 *et seq.* (West Supp. 1996). Defendant Sun World argues that it is "situated" in Texas by virtue of its branches in Texas, and that Texas clearly grants state banks the authority to establish and maintain a branch office at any location on prior written approval of the banking commissioner.[7] This Court finds these arguments to be without merit. Sun World's relocation of its main office to Santa Teresa, New Mexico, caused it to be "situated" in New Mexico for purposes of Section 36(c). As of the date of the relocation of its main office, Sun World was no longer "situated" in Texas. It follows that Sun World is not a Texas state bank under Article 342-3.201 *et seq.*, and therefore has no authority to establish and maintain a branch at the location of its former main office pursuant to Article 342-3.203.

New Mexico law also prohibits Sun World's actions under these circumstances. New Mexico enacted the

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[7]TEX. CIV. STAT. ANN. art. 342-3.203 states, in relevant part:

> A state bank may establish and maintain branch offices at any location on prior written approval of the banking commissioner.

Interstate Bank Branching Act, effective as of June I, 1996.[8] This Act allows New Mexico state banks to establish, maintain and operate one or more branches in a state other than New Mexico pursuant to an interstate merger transaction in which the New Mexico bank is the resulting bank. Interstate branching, either de novo or by acquisition of one or more branches, which does not involve all or substantially all of the assets and branches of a New Mexico bank, is prohibited. *Id.* at § 58-1C-5. Currently, a New Mexico state bank may not acquire branches in Texas. As noted earlier, Sun World is "situated" in New Mexico for purposes of Section 36(c). Once the amendments to Sections 30 and 36 take effect, on June 1, 1997, a New Mexico state bank will still be unable to acquire branches in Texas.

Accordingly, **IT IS HEREBY ORDERED, ADJUDGED** and **DECREED** that Plaintiff's Cross-Motion for Summary Judgment is **GRANTED**.

IT IS FURTHER ORDERED that Defendant Comptroller of the Currency's Motion for Summary Judgment, and Defendant Sun World's Motion for Summary Judgment, are hereby **DENIED.**

Finally, **IT IS ORDERED** that all other motions presently pending before the Court, which have not been

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[8] N.M. STAT. ANN. §§ 58-1C-1 to -13 (Michie Supp. 1996). The Court notes that the effective date of the Act was prior to the date on which Sun World relocated its main office to New Mexico.

addressed above, are hereby rendered **MOOT** by this Order.

SIGNED this **29th** day of **October, 1996.**

THE HONORABLE DAVID BRIONES
UNITED STATES DISTRICT JUDGE

D-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CATHERINE A. GHIGLIERI, in her official capacity as Texas Banking Commissioner	§	
Plaintiff,	§	
v.	§	Civil No. 3:95-CV-2001-H
EUGENE A. LUDWIG, in his official capacity as United States Comptroller of the Currency, and COMMERCIAL BANK OF TEXARKANA, Texarkana, Texas	§	
Defendants.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INDEX

Introduction 1

I. Motions to Strike Affidavits 3

II. Findings of Fact 5

III. Conclusions of Law 8

A. Standard of Review 8

B. Summary Judgment Standard 10

C. Procedural Defects in the Bank's Application 11

D. Relocation Pursuant to Section 30 13

E. Simultaneous Relocation, Retention of Existing Branches and Establishment of Former Main Office as Branch Is Not Authorized by Law 18

1. No Implied Authority to Retain Branches Under Section 30 18

2. The Riegle-Neal Act and Texas' Opt-Out Provision 32

3. Establishment of Former Main Office as a

Branch Pursuant to Section 36(c) 36

IV. Conclusion 43

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CATHERINE A. GHIGLIERI, in her official capacity as Texas Banking Commissioner	§	
Plaintiff,	§	
v.	§	Civil No. 3:95-CV-2001-H
EUGENE A. LUDWIG, in his official capacity as United States Comptroller of the Currency, and COMMERCIAL BANK OF TEXARKANA, Texarkana, Texas	§	
Defendants.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This is a case of first impression. Plaintiff Texas Banking

Commissioner seeks judicial review pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., of two decisions issued by Defendant Comptroller of the Currency ("Comptroller" or "OCC"). The Comptroller's first decision ("Decision"), issued March 8, 1995, approved two applications of Commercial National Bank of Texarkana, Arkansas (the "Bank") to 1) relocate its main office to Texarkana, Texas while retaining its existing branches in Arkansas and 2) to open a new branch at the site of the Bank's main office in Texarkana, Arkansas. The second decision challenged was issued on August 24, 1995. That decision permitted the Bank to open a temporary facility in Texarkana, Texas pending construction of the relocated main office.

In her First Amended Complaint ("Complaint"), Plaintiff seeks a declaratory judgment setting aside the Comptroller's decisions. Plaintiff also seeks an order permanently enjoining 1) the Bank's Texas operations; 2) the Bank from conducting banking operations in Texas while retaining any branches in any other state, including Arkansas; and 3) the Comptroller from approving any further applications for the relocation of an out-of-state bank into Texas, or in the alternative, from concurrently approving any transaction involving the relocation of a national bank into Texas coupled with the establishment and retention of bank branches in the state of the former main office of such national bank. Complaint at 8-9.

The parties have filed motions for summary judgment.[1] In

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[1] The Bank and the Comptroller have filed both filed Motions to Dismiss, or, alternatively, Motions for Summary Judgment. Plaintiff has filed a Motion for Summary Judgment. The Court will treat the Motions to Dismiss as Motions for Summary Judgment pursuant to Fed.R.Civ.P. 12(b).

addition, the Bank has filed Motions to Strike two affidavits submitted in support of Plaintiff's Motion for Summary Judgment. Three amicus curiae briefs have been filed in support of Plaintiff's position.[2] The Court heard oral argument on the summary judgment motions on May 2, 1996.

I. MOTIONS TO STRIKE AFFIDAVITS

The Bank has filed objections to the Affidavit of Commissioner Catherine A. Ghiglieri ("Ghiglieri" or "Plaintiff") and to the Affidavit of Dennis Waters ("Waters") that Plaintiff submitted in support of her Motion for Summary Judgment. The Bank argues that these affidavits should not be considered by the Court because the Court has already ruled that there would be no discovery in this case.

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[2] The briefs -- all filed on January 29, 1996 -- were submitted by three different groups.

The first group represented by a brief is the State Bank Commissioners and Supervisors and the Conference of State Bank Supervisors ("CSBS"). The State Bank Commissioners from the following states have joined in this brief: Oklahoma, Iowa, Connecticut, New Hampshire, North Dakota, West Virginia, Arkansas, Virginia, Delaware, Maine, Michigan, Colorado, Mississippi and the District of Columbia. CSBS is the professional association of state government officials (including the Commissioners) who are responsible for chartering and regulating state-chartered banking institutions. The Commissioners' and CSBS' brief will hereinafter be referred to as "Commissioners' Amicus Brief".

The second group is the Independent Bankers Association of Texas ("IBAT"). IBAT is a trade association of independent state and national community banks throughout Texas. This brief will hereinafter be referred to as "IBAT's Amicus Brief".

The third brief was filed by Consumers Union. Consumer's Union is a nonprofit organization that publishes various publications including *Consumer Reports*. This brief will hereinafter be referred to as "Consumer Union's Amicus Brief".

On December 14, 1995, the Bank filed a Motion to Quash Notice of Intention to Take Deposition with Subpoena Duces Tecum and for Protective Order, and the Comptroller filed a Motion for Protective Order. Both Motions were referred to Magistrate Judge John B. Tolle for disposition, pursuant to 28 U.S.C. § 636(b). Judge Tolle held a hearing on Defendants' Motions and issued an Order on January 16, 1996 granting both Motions and holding that Defendants would not be required to engage in discovery in this action except on further order of this Court. See Order dated January 16, 1996. Plaintiff filed Objections to the Magistrate's Order on January 26, 1996. After considering Plaintiff's Objections, and the pleadings related thereto, the Court overruled the objections and affirmed the Magistrate Judge's Order pursuant to 28 U.S.C. § 636(b)(1)(A). See Order dated February 12, 1996.

Because the Court concurred with the Magistrate Judge in finding that there would be no discovery in this action, the Court is of the opinion that the Bank's Motions to Strike should be, and they are, **GRANTED**. The challenge to the Comptroller's decisions is limited to the Administrative Record ("Record") and the Affidavits will not be considered by the Court. Accord Camp v. Pitts, 93 S.Ct. 1241 (1973)("focal point for judicial review should be the administrative record already in existence"); State of Tex. v. Clarke, 690 F. Supp. 573, 578 (W.D.Tex. 1988)(court's decision as to propriety of Comptroller's determination on branching issues must be based on evidence offered in administrative record). See also 5 U.S.C. § 706 (" . . . the court shall review the whole record or those parts of it cited by a party . . . .").

II. FINDINGS OF FACT

1. Any finding of fact containing a conclusion of law is also a conclusion of law. Any conclusion of law containing a finding of fact is also a finding of fact.

2. Catherine Ghiglieri is the Banking Commissioner of the State of Texas and is charged with the administration of the Texas Banking Code and Texas Banking Act. Stipulated Fact No. 1.

3. Eugene A. Ludwig is the Comptroller of the Currency and heads the OCC, a bureau of the Treasury Department charged with the administration of the National Bank Act, 12 U.S.C. §§ 1 et seq.. Stipulated Fact No. 2.

4. The Bank is a national banking association chartered by the OCC pursuant to the National Bank Act, 12 U.S.C. §§ 21, et seq., and given Charter No. 15257. Stipulated Fact No. 3.

5. As of December 5, 1994, the Bank operated from its main office located at 224 East Fourth Street, Texarkana, Miller County, Arkansas 7550[4]. Stipulated Fact No. 4.

6. As of December 5, 1994, the Bank operated three branch offices in Arkansas, two in Texarkana and one in Fouke, and one stand-alone customer-bank communication terminal branch in a grocery store in Texarkana, Arkansas. All of these facilities are in Miller County, Arkansas. Stipulated Fact No. 5.

7. On December 5, 1994, the Bank filed an application to move its main office from 224 East Fourth Street, Texarkana, Miller County, Arkansas 75504, to 5515 Summerhill Road,

Texarkana, Texas. Stipulated Fact No. 6.

8. Also on December 5, 1994, the Bank filed an application with the OCC to establish a branch office at 224 East Fourth Street, Texarkana, Miller County, Arkansas 75504. Stipulated Fact No. 7.

9. The distance between the site of the Bank's then existing main office in Texarkana, Arkansas, and the proposed new location for its main office in Texarkana, Texas, is less than 30 miles. Stipulated Fact No. 9.

10. Plaintiff filed objections to the Bank's applications with the OCC. The Arkansas Banking Commissioner also filed objections. Stipulated Facts Nos. 10 and 11.

11. On March 8, 1995, Frank Maguire, then Senior Deputy Comptroller for Corporate Activities and Policy Analysis, approved the Bank's applications to relocate its main office to 5515 Summerhill Road and to establish a branch at the Bank's former main office site in Texarkana, Arkansas. Stipulated Fact No. 12.

12. On March 20, 1995, Plaintiff wrote to the Comptroller requesting reconsideration and abatement of the Decision. The OCC denied that request on April 11, 1995. Stipulated Fact No. 13.

13. On August 21, 1995, the Bank requested approval to locate an office at 5512 Summerhill Road, Texarkana, Texas, temporarily while constructing a new building at 5515

Summerhill[,] Road, Texarkana, Texas. The cost of the new building is approximately $1,500,000. Stipulated Fact No. 14.

14. Three days later, on August 24, 1995, the Comptroller approved the Bank's request that it be allowed to operate a temporary office at 5512 Summerhill Road, Texarkana, Texas. Stipulated Fact No. 15.

15. In May 1995, the Texas Legislature passed HB 889. See Act of Apr. 19, 1995, 74th Leg., R.S. ch. 58, 1995 Tex. Sess. Law Serv. 437 (Vernon). Friday, August 25, 1995 was the last business day prior to the effective date of Texas HB 889, which was effective on August 28, 1995. Stipulated Fact No. 16.

16. After opening its temporary Texas office at 5512 Summerhill Road, Texarkana, Texas the Bank continues to maintain its Arkansas Banking operations. Bank's Motion at 2.

17. The Administrative Record does not reflect that the Bank amended its 1964 organization certificate to specify its relocation to Texarkana, Texas, before August 24, 1995. Plaintiff's Response at 10. Nor does the Administrative Record reflect that the Bank's articles of association were amended before that date. Plaintiff's Motion at 4.

18. The Administrative Record does not reflect that the Bank's shareholders approved the main office relocation. Bank's Reply at 2.

III. CONCLUSIONS OF LAW

A. STANDARD OF REVIEW

1. "The Comptroller has wide discretion in the field of national banking and the exercise of his discretion will not be disturbed except when the exercise is arbitrary, capricious, or contrary to law." First Nat'l Bank of La Marque v. Smith, 610 F.2d 1258, 1264 (5th Cir. 1980)(citing Ramapo Bank v. Camp, 425 F.2d 333, 341 (3rd Cir.), cert. denied, 400 U.S. 828 (1970); First Nat. Bank of Bellaire v. Comptroller of the Currency, 697 F.2d 674, 680 (5th Cir. 1983); 5 U.S.C. § 706(2)(A). The Comptroller's determination must be upheld if it is a "permissible construction" of the National Bank Act. Dept. of Banking and Consumer Finance v. Clarke, 809 F.2d 266, 269 (5th Cir.), cert. denied, 107 S.Ct. 3240 (1987)(citing Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984); Texas v. U.S., 756 F.2d 419 (5th Cir.), cert. denied, 106 S.Ct. 129 (1985).

2. The Comptroller's discretion is not "unbridled." See Bellaire, 697 F.2d at 680. "The Comptroller must be subordinate to the law from which he received his authority, and is subject to the limitations imposed by that law. . . . Though he may exercise the discretion the expertise of his office affords him, the congressional grant of authority does not empower arbitrary and capricious action, nor does it contemplate abuses of that discretion." Id. (citation omitted).

3. The arbitrary and capricious standard applies to factual controversies. Seattle Trust & Savings Bank, 492 F.2d 48, 50 (9th Cir.), cert. denied, 95 S.Ct. 77 (1974). When the issue is whether the Comptroller has acted within the limitations imposed upon him by federal and state law, the standard of review is *de novo*. Id.; State ex Rel. Edwards v. Heimann, 633 F.2d 886,

888 n. 1 (9th Cir. 1980)(The district court's review of the Comptroller's decision is a *de novo* determination of the legal issues involved.).

4. "While administrative agencies are expert in technical problems within their jurisdiction, they enjoy no special skill in statutory construction, an area in which courts are the final authority." Western Coal Traffic League v. U.S., 694 F.2d 378, 383-84 (5th Cir.), *on rehearing*, 719 F.2d 772 (5th Cir. 1982), cert. denied, 104 S.Ct. 2160 (1984)(footnote omitted).

B. SUMMARY JUDGMENT STANDARD

5. In proper circumstances, awarding summary judgment is not disfavored in the federal courts: "[summary judgment reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." Fontenot v. Upjohn Co., 780 F.2d 1190, 1197 (5th Cir. 1986).

6. Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56.

7. The Court concludes that there are no material disputed facts in this case and that disposition by summary judgment is appropriate.

C. PROCEDURAL DEFECTS IN THE BANK'S

APPLICATIONS

8. The Court finds that the procedural defects in the Bank's applications are insufficient to warrant the relief Plaintiff seeks. See Curtill-Wright Corp. v. McLucas, 381 F. Supp. 657, 661 (D.N.J. 1974)(Court is not required to set aside agency decision when the legal deficiencies of the decision are readily curable, and the deficiencies do not squarely interfere with rights of protesting party).

9. The Court agrees with the Comptroller that there is no statutory or regulatory requirement that the Bank's organization certificate be amended *before* the Bank relocated its main office or before the Comptroller approved the relocation. Comptroller's Motion at 7; Oral Argument of Larry Stein, counsel for the OCC. Further, the Comptroller concedes that the Bank must amend its articles of association pursuant to 12 C.F.R. § 5.40(d)(3) but there is no basis for finding that the failure to do so before the move indicates an erroneous decision by the Comptroller. Comptroller's Motion at 8 n.7; Oral Argument of Larry Stein.

10. Similarly, the Court is not persuaded that the Comptroller's decisions should be invalidated because the Bank did not obtain the requisite shareholder approval, pursuant to 12 U.S.C. § 30.[3]

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[3] 12 U.S.C. § 30 is a part of the National Bank Act, 12 U.S.C. §§ 1 et seq.. For the purposes of these Findings and Conclusions, when the Court refers to the National Bank Act, the Court is referring to 12 U.S.C. § 30. The part of the National Bank Act that pertains to branch banks is known as the McFadden Act, 12 U.S.C. § 36. Thus, when the Court refers to the McFadden Act, the Court is referencing 12 U.S.C. § 36.

Although the Record does not demonstrate that the shareholder approval was obtained, the Court is of the opinion that this is a defect which could be easily remedied. The omission does not invalidate the Comptroller's decisions.

D. RELOCATION PURSUANT TO SECTION 30

11. Federal law determines what constitutes a branch. State Ex Rel. Edwards v. Heimann, 633 F.2d 886, 889 (9th Cir. 1980).

12. 12 U.S.C. § 30 of the National Bank Act applies to main office relocations, and not to branch relocations. On the other hand, the McFadden Act, 12 U.S.C. § 36, applies to branching

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12 U.S.C. § 30 is titled "Change of name or location" and it provides, in relevant part, as follows:

> (a) Name change
>
> Any national banking association, upon written notice to the Comptroller of the Currency, may change its name, except that such new name shall include the wor[d] "National".
>
> (b) Location change
>
> Any national banking association, upon written notice to the Comptroller of the Currency, may change the location of its main office to any authorized branch location within the limits of the city, town, or village in which it is situated, or, with a vote of shareholders owning two-thirds of the stock of such association for a relocation outside such limits and upon receipt of a certificate of approval from the Comptroller of the Currency, to any other location within or outside the limits of the city, town, or village in which it is located, but not more than thirty miles beyond such limits.

12 U.S.C. § 30 (West 1989).

authorizations.[4]

13. Plaintiff vigorously argues that the Comptroller's approval of the relocation of the Bank's main office pursuant to 12 U.S.C. § 30 was unauthorized because the new office in Texas is in effect a branch, and is not authorized under 12 U.S.C. § 30. Specifically, Plaintiff argues that the "Administrative Record contains no evidence to support a finding that [the Bank's] Texas operations constitute the relocation of its main office in compliance with Section 30." Plaintiff's Reply at 4.[5]

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[4] Section 36, which is titled "Branch banks" provides, in relevant part, as follows:

> The conditions upon which a national bank may retain or establish and operate a branch or branches are the following:
>
> . . . .
>
> (c) New branches
>
> A national banking association may, with approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not by implication or recognition, and subject to the restriction as to location imposed by the law of the State on state banks.

12 U.S.C. §36 (West 1989).

[5] Plaintiff relies on the Waters and Ghiglieri Affidavits to argue that the evidence demonstrates that the relocated office is in reality a branch, and not a main office. Alternatively, in the event the Court rules, as it has, that judicial review is limited to the Administrative Record, Plaintiff argues that "there is inadequate evidence to support a rational conclusion that the *temporary* site is

14. The Court disagrees, and finds that the Bank is not operating a branch in Texarkana, Texas but rather a temporary main office.

15. Section 30(b) was amended in 1959 to delete the requirement that such a move be "within the same state." McEnteer v. Clarke, 644 F. Supp. 290, 292 (E.D.Pa. 1986). On its face, Section 30 permits relocations of a main office without regard to state lines. State of Idaho, 994 F.2d at 1444 (citing 12 U.S.C. § 30(b)).

16. "Section 30 does not oblige the Comptroller to first find "necessity" before he approves relocation of a national banking association's main office." Traverse City State Bank v. the Empire National Bank, 228 F. Supp. 984, 990 (W.D.Mich. 1964). "The statute is silent on the finding of "necessity" as a condition precedent to his approval of a national bank's main office. The language of the statute makes the move dependent only upon "approval" by the Comptroller and a vote of two-thirds of the shareholders of the national bank." Id.

17. There are various distinctions between a main office and a branch. Ramapo Bank, 425 F.2d at 341; see also Brief of the Comptroller in Marion National Bank of Marion v. The Van Buren Bank, 418 F.2d 121 (7th Cir. 1969) at 9-11 (submitted by Steven A. Fleckman at oral argument). As the Third Circuit noted in Ramapo Bank, one capital structure is authorized to the main office, regardless of the number of branches. 425 F.2d at 341. A branch does not have a board of directors. Id.

[the Bank's] current main office." Plaintiff's Response at 9.

Residency requirements are imposed on the directors in relation to the main office without regard to the location of the branches. Id. Lending limitations are based on the structure of the main office without regard to the number of branches. Id. A branch does not have separate shareholders. Id. A branch may be closed at any time without approval of either the shareholders or the Comptroller, whereas a main office may be closed only by liquidation, merger, or receivership, all of which require shareholder approval. Id. Applying these factors to the instant case, there is nothing in the Record to suggest that the relocation authorized a branch, rather than a main office.

18. In Ramapo Bank, the Third Circuit suggested that a temporary main office may constitute a "main office" pursuant to Section 30. 425 F.2d at 339-40 n. 19; see also Oral Argument of Charles Haworth, counsel for the Bank.

19. That the Bank is operating a temporary office does not establish that the office is a branch, rather than a main office. The Bank has stated reasons why it has not yet begun construction of its main office in Texas. Bank's Motion at 3; Oral Argument of Charles Haworth. The Court agrees that it is reasonable that the Bank has decided to delay construction pending the outcome of this litigation. See Oral Argument of Charles Haworth.[6]

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[6] Mr. Haworth stated that " . . . to suggest . . . that we would have already moved into a permanent facility in Texas at a cost of a million to a million and a half dollars while this litigation is pending and while they are seeking a permanent injunction to throw us out of the state of Texas is silly to me." Transcript of May 2, 1996 Oral Argument ("Transcript") at 21.

20. Because the Court finds that the relocated main office is not a branch office in disguise, there is nothing erroneous in the Comptroller's approval of the Bank's application to relocate the main office under Section 30.[7] Plaintiff does not take issue with the relocation of the *main office* under Section 30, if the Court agrees -- as it does -- that the office that was relocated is not actually a branch office.[8]

E. SIMULTANEOUS RELOCATION, RETENTION

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[7] The Court confines this finding to the *relocation* of the main office, only. The Court addresses retention of the Bank's branches in Arkansas separately. See *infra* at 18-32.

[8] The following exchange at oral argument between Plaintiff's attorney and the Court indicates Plaintiff's position on this issue:

COURT: I take it would you agree that if it is a relocation, it is authorized by Section 30, just the relocation to Texarkana alone in Texas?

MS. JOHNSON: If its [a] bona fide relocation of the main office.

COURT: If it's bona fide?

MS. JOHNSON: Yes, Your honor. What we contest here is the retention of the branches and the branches that are interstate branches that have resulted as a result of this transaction.

. . . .

COURT: And I may be repetitious here, but you don't contest their authority then to relocate as such, their authority to relocate their headquarters under Section 30.

MS. JOHNSON: We are not going to take that position in this case.

Transcript at 23, 28.

OF EXISTING BRANCHES AND ESTABLISHMENT OF FORMER MAIN OFFICE AS BRANCH IS NOT AUTHORIZED BY LAW

21. The Court is of the opinion that the key issue in this case is whether the Comptroller acted within the law by authorizing the Bank to retain its existing Arkansas branches when it granted the Bank authority to relocate its main office to Texas. For the reasons discussed below, the Court concludes that the Comptroller's March 8, 1995 Decision which allowed relocation of the Bank's main office and simultaneous retention of branches in Arkansas as well as establishment of a branch at the site of the former main office was contrary to law, and must be set aside.[9]

1. NO IMPLIED AUTHORITY TO RETAIN BRANCHES UNDER SECTION 30

22. The Comptroller argues that "[w]hen a national bank relocates its main office under Section 30, it may continue to operate its existing branches as an implied, but necessary, adjunct to the express authority to move the main office." Comptroller's Motion at 12-17, Decision at 4. The Court disagrees and concludes -- based on an examination of the relevant cases, statutes, and legislative history -- that when a national bank relocates its main office under Section 30, there is no implied authority to continue the operation of its existing

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[9] Because the August 24, 1995 Decision allowing the temporary main office facility was issued in connection with the main office relocation approval granted in the March 8 Decision, it is obvious that the August 24 decision must also be set aside.

branches under Section 30.[10]

23. The Court agrees with Plaintiff and amici curiae that the effect of the Comptroller's position is to allow national banks to establish interstate branching networks in multiple states, without regard to and in violation of the provisions of Section 36.[11] See Commissioner's Amicus Brief at 3; Plaintiff's Response at 2. See also Oral Argument of Larry Stein, counsel for OCC.[12]

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The Court observes that two sections in the National Bank Act allow for retention of branches in some banking transactions. Section 36(b)(1) states that a national bank resulting from the conversion of a State bank may retain and operate as a branch in some situations. See 12 U.S.C. § 36(b)(1). In addition, Section 36(b)(2) provides that a national bank resulting from the consolidation of a national bank with another bank may, under certain circumstances, retain a branch office. See 12 U.S.C. § 36(b)(2). Neither of these scenarios is implicated in the instant case.

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The Court notes that while some branching networks may lawfully be established under Sections 36(b)(1) and (2) (see *supra* at n. 10), the potential branching ability the Court refers to in this case is the establishment of *de novo* branches. A *de novo* branch is a branch that a bank establishes on its own, without acquiring any other financial institution. Commissioner's Amicus Brief at 3 n. 1.

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The following excerpt from the Oral Argument demonstrates that under the OCC's view of implied retention under Section 30, the Bank would be able to establish *de novo* branches even if such establishment would not be permitted under state law:

> COURT: What's to stop, at least until [the Riegle-Neal Act takes effect] under your theory, why couldn't the Bank just leap-frog from state to state?
>
> MR. STEIN: Well, the [Comptroller] is not obligated to grant the approval. The OCC has the discretion to grant or deny, of course . . . .

24. Section 30 and 36 are silent with respect to retention of branches after main office relocation, as the Comptroller acknowledges. See Comptroller's Motion at 10; Decision at 6.[13] In his March 8 Decision, the Comptroller acknowledges that the statutes are silent on the branch retention issue, but nonetheless concludes that by "examining the overall statutory framework and its historical development," Decision at 6, it can be inferred that Congress intended that retention be allowed. In a prior decision -- which the Comptroller refers to in the March 8 Decision -- the Comptroller acknowledged that "the legislative history of the statutes . . . does not address [the question of retention] question directly." Record at 50.[14]

25. The Comptroller's position that Section 30 must be read independently of the McFadden Act (Section 36) is not persuasive in light of the fact that Section 36 enunciates the

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> COURT: Of course, it would be up the [Comptroller], but then, under the law, at least as we have it now under the [Comptroller's] interpretation in this particular situation, that would be possible, wouldn't it?
>
> MR. STEIN: That's correct, your honor.
>
> COURT: No matter what the state wanted.
>
> MR. STEIN: That's correct . . . .

Transcript at 12.

[13] The Riegle-Neal Act changed this, and the issue of branch retention is now addressed under that Act. The changes, however, do not take effect until 1997. See related discussion *infra* at pp. 32-36.

[14] See Decision of the Comptroller on the Applications of Bank of Midwest of Kansas, National Association, Lenexa, Kansas, and Bank Midwest, National Association, Kansas City, Missouri, dated February 16, 1995.

"conditions upon which a national bank may *retain* or establish and operate a branch or branches . . . ." 12 U.S.C. § 36 (emphasis added). The Court finds no basis to read retention considerations into Section 30 when Section 36 expressly covers branch retention. See Lewis v. United States, 445 U.S. 55, 60 (1980) ("The Court has stated repeatedly . . . that in any case concerning the interpretation of a statute, the starting point must be the language of the statute itself.").

26. The pleadings in this case contain voluminous references to the legislative history of the National Bank Act (12 U.S.C. § 21, et seq.) and to the general history of banking in the United States and Texas. The Court will not attempt to recite those detailed explanations here. Instead, the Court chooses to start with 1924, when the Supreme Court ruled that national banks had no general authority to establish branches. See First National Bank in St. Louis v. Missouri, 263 U.S. 640, 656 (1924).

27. Congress passed the McFadden Act (12 U.S.C. § 36) in 1927 to allow both national and state banks to establish branches within the municipality of their main banking facilities in those states that permitted branch banking at the time of the enactment of the bill. First Nat. Bank v. Walker Bank & Trust Co., 385 U.S. 252, 257-58 (1966). In Walker Bank, Justice Clark noted that "Congress intended to leave the question of the desirability of branch banking up to the states." Id. at 258. The Senate Report on the McFadden Act states that the Act should permit national banks to have branches in those cities where state banks are allowed to have them under state law. Id. (citing S.Rep. No. 473, 69th Cong. 1st Sess., 14 (1926)). A grandfather clause permitted retention of branches operated at the date of enactment. Id. (citing H.R. Rep. No. 1481, 69th Cong., 1st Sess., 6 (1926)).

28. The McFadden Act's chief sponsor stated that Section 36 "repeals every provision of the law with which it is in conflict

and outlines clearly the conditions under which a national bank may have a legal branch or branches hereafter. This amendment establishes a national banking policy." 68 Cong. Rec. 5816 (1927)(remarks of Congressman McFadden following passage of the McFadden Act).[15]

29. Amendments to the McFadden Act did not authorize retention of branches once the Bank's main office had relocated to another state. In 1933, the Act was amended by the addition of 12 U.S.C. 36(c)[16] which permitted national banks to branch only within their home state and only to the extent that state banks were authorized to branch under state law. See Walker Bank, 385 U.S. at 259.

30. The National Bank Act (Section 30) was amended in 1959 and 1982. The 1959 amendments, *inter alia*, removed prior language requiring national banks to confine their main office relocations "within the same state." The Comptroller acknowledges that the 1959 amendments to the National Bank Act were mostly technical, and the substantive amendment to Section 30 was "minor". See Bank Midwest Decision, Record at 40. The legislative history of the 1959 amendments suggests that the amendments were uncontroversial. See Plaintiff's Response at 24 (citing 105 Cong. Rec. 14, 777 1959; 105

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[15] See also Record at 56 n. 18 (Comptroller's Bank Midwest Decision Part II(A)(2)(c)), wherein the Comptroller attempts to exaggerate the significance of this legislative history. The Court is not persuaded by the Comptroller's rationalization. The Court agrees, though, that Congressman McFadden's floor statement may not shed much light on Congress' intent regarding retention of branches. See e.g. Clarke v. Securities Industry Association, 479 U.S. 388, 405-09 (1987)("Representative McFadden cannot be considered an impartial interpreter of the bill that bears his name . . . . ").

[16] See *supra* at n. 4.

Cong.Rec. 16, 781-82 (1959)). See also Oral Argument of Larry Stein, counsel for OCC;[17] Ramapo Bank, 425 F.2d at 345-46 n. 35)("Section 30 was amended to require Comptroller approval before a national bank could change the location of its main office . . . . There is no evidence of any other congressional purpose ever having been voiced with respect to Section 30".). The fact that the interstate restriction in Section 30 was deleted does not, as the Comptroller suggests, mean that Congress intended to authorize relocation to another state with simultaneous retention of branches in the state of the former main office location. See Record at 42.[18]

31. Similarly, the 1982 amendments to the National Bank Act (Section 30) did not address the legality of branch retention upon a main office relocation to another state. The 1982 amendments were technical in nature and did not address the issue presented in this case. The Court disagrees with the Comptroller's strained conclusion that Congress' inaction on this issue in 1982 creates an implied right to retain branches after main office relocation to another state.

32. The Comptroller reasons, *inter alia*, that because other statutes contain additional banking authority, the McFadden Act

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[17] Mr. Stein, the Comptroller's attorney, stated at oral argument that "[r]elocation authority has remained the same basically since 1886 except in 1959 Congress removed the in-state limitation." Transcript at 6.

[18] The Court notes that the parties have briefed the implication of the 1956 Douglas Amendment to the Bank Holding Company Act, 12 U.S.C. § 1842(d). Plaintiff acknowledges that the Act is not implicated in this case (Plaintiff's Response at 22) and the Court therefore declines to address the significance of the Amendment. The Court does note, however, that the main purpose of the Douglas Amendment was to apply the McFadden Act to Bank Holding Companies because those companies were previously not governed by the Act.

does not represent the exclusive authority for national bank branching. Comptroller's Reply at 16 (citing 12 U.S.C. §§ 1823(f)(4)(B) and 1823 (k)). However, the Court could just as easily interpret the existence of additional references to branch banking in the limited circumstances of 12 U.S.C. § 1823 as evidence that "Congress recognizes the need to provide express exceptions to the restrictions on interstate branching." IBAT's Amicus Brief at 8. The Comptroller's argument on this issue is devoid of merit.

33. Likewise, the Court is not persuaded by the Comptroller's tenuous argument regarding implied repeal. According to the Comptroller, allowing retention of existing branches under Section 30 does not conflict with the McFadden Act (Section 36) because an intent to repeal the effect of Section 30 is not evident. Comptroller's Reply at 16 (citing Watt v. Alaska, 451 U.S. 259, 266-67 (1981)(implied repeal is not favored and is used only when two statutes clearly address the same subject and are irreconcilable; statutes will be construed to avoid conflict where possible). The Court finds that the doctrine of implied repeal is completely irrelevant in this context. The Court does not question the authority to relocate a main office pursuant to Section 30. Section 30 does not speak to the issue of branch retention. By finding no implied authority to retain branches under Section 30, the Court is not repealing Section 30 by implication.

34. The Comptroller relies on several cases to support his claim of implied retention authority under Section 30. The cases relied upon do not address the precise issue presented in this case -- whether Section 30 permits national banks to move their main offices across state lines while retaining branches in their former home states.

35. For example, the Comptroller relies on Ramapo Bank, 425 F.2d 333. In that case, the Third Circuit held that Section 30 controls with respect to an application for a national main office

relocation free of the impact of state banking laws. 425 F.2d at 344. In effect, Ramapo Bank allowed a national bank to relocate its main office within the same state, and to retain its former main office as a branch, under circumstances where a direct branching transaction would have been prohibited by the McFadden Act (Section 36), which incorporates state law branching considerations. Adopting the rationale of the Traverse City case,[19] the Ramapo Bank court distinguished a contrary result that the Seventh Circuit reached in Marion National Bank, 418 F.2d 121.

36. In Marion National Bank, the Seventh Circuit held that there must be a conjunctive reading of Sections 30 and 36 with respect to an application of a national bank's main office and the conversion of its existing main office into a branch office, relying on Walker Bank, 385 U.S. 252.[20] The Marion National Bank court stated that where relocation and branch establishment were part of a "single indissoluble process," Sections 30 and 36 must be read together in light of the overall effect. 418 F.2d at 124. The court found the Traverse City case unpersuasive, and held that the "maneuver proposed involves creation of a branch which would not be authorized to state banks by the statute law" of the state in question, "and is therefore not authorized for national banks by 12 U.S.C. §

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[19] See Traverse City State Bank v. Empire Nat'l Bank, 228 F. Supp. at 992.

[20] Ramapo Bank, Marion National Bank and Traverse City all related to *intrastate* relocation/branching transactions, not to *interstate* moves. There appear to be no cases addressing interstate relocation and branch retention. Accord Oral Argument of Larry Stein, Transcript at 52 ("The [Traverse City] court didn't comment upon retention of existing branches because those were not before the [c]ourt. We have never had a court decision speak to the precise issue of retention of a bank's existing branch in the context of interstate relocation.")

36(c). Id. at 125. Thus, in Marion National Bank, the branch application was rejected because the application was not authorized by state law.[21]

37. The Court declines to follow Ramapo Bank's holding that Section 30 is not limited by Section 36 and observes that a district court in this Circuit has cited Marion National Bank with approval. See First National Bank of Southhaven v. Camp, 333 F. Supp. 682, 88-90 (N.D.Miss.) *aff'd w/out opinion*, 467 F.2d 121 (5th Cir. 1971). Noting the conflict among the Circuits regarding whether Sections 30 and 36 should be viewed in tandem, the Southhaven court declined to "adopt either interpretation as an absolute" but concluded that "the Comptroller may consider the relationship between the two statutes to test the good faith nature of simultaneous applications" of a national bank for main office relocation and retention of the main office as a national branch. Id.[22] Thus,

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[21] The Court is aware that Marion National Bank is factually distinguishable from the instant case because the "new" branch application in the instant case was decided under Section 36(c) ostensibly in *accordance* with state law. However, the only reason that Section 36(c) could be applied to the branch application in the instant case is because the Bank was permitted to retain its existing branches under the non-existent "implied" authority for branch retention under Section 30. The Court discusses Section 36(c) and the applicable state law *infra* at pp. 36-42. Marion National Bank is thus instructive in that it mandates that the overall nature of the Bank's applications should be examined together, rather than in isolation. Additionally the Court notes that other courts have grappled with the meaning of the word "new" in Section 36(c). See e.g. Heimann, 633 F.2d at 890 (Marion National Bank and Ramapo Bank do not conclusively establish the meaning of the word "new" but do support the district court's decision that Section 36(c) applies both to a "new" branch and to an "already-existing branch that might be acquired.")

[22] In the instant case, there is no dispute that Section 36 applies to the Bank's application to establish its former main office as a branch, and the Comptroller authorized that aspect of the Bank's application under that Section. The aspect of this case which necessitates -- in the Court's view -- a conjunctive reading

the Court concludes that the Comptroller's insistence that Section 30 is in no way limited by the McFadden Act (Section 36) has no support in this Circuit.

38. This Court's view comports with the principle of *pari materia* which suggests that statutory provisions should be construed with other provisions, and not in isolation. See Saxon v. Georgia Ass'n of Independent Ins. Agents. Inc., 399 F.2d 1010, 1013 (5th Cir. 1968).

39. Further, the Comptroller has previously taken the position that Section 30 cannot be read independently from Section 36. An Affidavit of past Comptroller James Saxon ("Saxon") in Traverse City demonstrates that the OCC was aware of an interdependence between the two sections. In his Affidavit[23] Saxon reviewed two files of his predecessor in which national banks had requested approval of main office relocations under Section 30, accompanied by establishment of a branch at the site of the former main office pursuant to Section 36(c). As Plaintiff notes, the two applications received different treatment because of the relevant state law which was examined pursuant to Section 36.[24]

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of both Sections concerns the *retention* of already-existing Arkansas branches after the main office was moved.

[23] See Appendix E, attached to Plaintiff's Reply. The Court notes that Defendants do not object to this exhibit. See Defendants' Objections to Plaintiff's Exhibits at 2, filed April 15, 1996.

[24] Again, the Court notes that the cases examined by Saxon are distinguishable from this case because they did not deal with an "implied" authority for retention under Section 30. However, the Affidavit demonstrates support for Plaintiff's argument that Sections 30 and 36 are interrelated when an interstate main office relocation is accompanied by branch retention.

40. The Court also notes that OCC regulations suggest that Sections 30 and 36 cannot be viewed in isolation. The regulations state that a national bank desiring to retain the head office location as a branch must look to Section 36. See 12 C.F.R. §§ 5.40(d)(4); 5.30(a). The regulations further state that it is the OCC's "policy" that applications should be approved provided that "approval would not violate *the provisions of applicable federal law or state law that is incorporated into federal law regarding the establishment of* . . . branches." See 12 C.F.R. 5.30(c)(1)(emphasis added).

41. The Court notes that when an agency such as the OCC takes a position that is inconsistent with its previous views, that position is entitled to less deference. State Dept. of Idaho, 994 F.2d at 1445 (where an agency takes a position that is inconsistent with its previous views, the courts may owe less deference to the agency position; if new view is reasonable, it is entitled to some weight); I.N.S. v. Cardoza-Fonseca, 107 S.Ct. 1207, 1221 n. 30 (1987)(citing Watt v. Alaska, 451 U.S. 259 (1981)(internal quotations and other citation omitted).

42. The doctrine of competitive equality supports the Court's holding. The doctrine reflects Congress' intention to place national and state banks on a basis of competitive equality insofar as branch banking is concerned. Southhaven, 333 F. Supp. at 689 (citing Walker, 385 U.S. 252). See also First National Bank in Plant City v. Dickinson, 369 U.S. 122, 133 (1969) ("[T]he [doctrine] is . . . firmly embedded in the statutes governing the national banking system."); Dept. of Banking and Consumer Finance v. Clarke, 809 F.2d at 269 (Congress intended to place national and state banks on a basis of competitive equality insofar as branch banking was concerned). In enacting the McFadden Act (Section 36), "Congress was concerned that neither system have advantages over the other in the use of branch banking . . . . Id. (citation omitted). By using a non-existent "implied" authority to retain branches, the Comptroller has awarded the Bank a benefit which is not

available to Texas or Arkansas state banks.

42. The Court is unpersuaded by the Comptroller's attempts to isolate the impact of the doctrine of competitive equality from the transactions at issue in this case. See Oral Argument of Larry Stein, Transcript at 53. While it is true that the doctrine applies to branching decisions, rather than relocation decisions, the Court finds that the doctrine comes into play in a case such as this, where the branching decision can only exist by virtue of the "implied" retention of branches under Section 30. Because the practical overall effect of the Comptroller's decision is to allow interstate branching, the doctrine is relevant here. This is not merely "a relocation case," but a relocation decision coupled with retention and establishment of a new branch.[25]

43. The Court is also unimpressed by the Comptroller's argument that without retention of branches upon main office relocation, a bank would be penalized for exercising a right granted under the National Bank Act. Comptroller's Reply at 17; Oral Argument of Larry Stein. The right granted under the National Bank Act (Section 30) is the right to relocate a main office; Section 30 does not confer additional powers not authorized by statute.

44. The OCC has used the same legal approach regarding retention of branches after relocation in several of its prior decisions. See OCC American Security Bank, (OCC Corporate Decision No. 94-05, February 4, 1994); Bank Midwest Decision, February 16, 1995; Record at 24, and OCC First

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[25] Oral Argument of Larry Stein, Transcript at 53.

Fidelity/New Jersey Decision, A.R. 115.[26] The Court finds it noteworthy that the Comptroller must rely on his prior decisions as the basis for his conclusions, rather than on case law.

2. THE RIEGLE-NEAL ACT AND TEXAS' OPT-OUT PROVISION

45. The parties as well as the amici curiae devote considerable attention to the effect and purpose of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub.L.No. 103-328, 108 Stat. 2338 ("Riegle-Neal"). Riegle-Neal authorizes interstate branching by merger or acquisition of a bank unless a state has opted out. De novo branching is not authorized, however, unless the state passes a law affirmatively allowing it. Congress has given the states until May 31, 1997 to determine whether they will opt out. See 12 U.S.C. 36(g).[27] Riegle-Neal

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[26] Additional decisions on this issue may exist; the list does not purport to be all-inclusive.

[27] Section 36(g) provides, in relevant part, as follows:

> (1) In general
>
> Subject to paragraph (2), the Comptroller . . . may approve an application by a national bank to establish and operate a de novo branch in a State (other than the bank's home State) in which the bank does not maintain a branch if-
>
> (A) there is in effect in the host State a law that -
>
> (i) applies equally to all banks; and
> (ii) expressly permits all out-of-state banks to establish de novo branches in such State;
>
> . . . .

adds a new subsection (c) to Section 30[28], and a new subsection (e)(3)[29] to Section 36. The combination of these two additional

---

[28] Section (c) provides, in relevant part, as follows:

> Coordination with Section 36 of this title:
>
> In the case of a national bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State from which the bank relocated such office only to the extent authorized in Section 36(e)(2) of this title.

[29] Section 36(e)(2) provides, in relevant part, as follows:

> (e) Exclusive authority for additional branches
>
> (1) In general
>
> Effective June 1, 1997, a national bank may not acquire, establish, or operate a branch in any State other than the bank's home State . . . or a State in which the bank already has a branch unless the acquisition, establishment, or operation of such branch in such State by national bank is authorized under this section or section 1823(f), 1823(k), or 1831(u) of this title.
>
> (2) Retention of branches
>
> In the case of a national bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State which was the bank's home state . . . before the relocation of such office only to the extent the bank would be authorized, under this section . . . to acquire, establish, or commence to operate a branch in such State if -
>
> (A) the bank had no branches in such State; or

sections authorizes the retention of branches by a national bank relocating across state lines where such branches can lawfully be established under state law. The provisions do not take effect until June 1, 1997.

46. In May 1995, the Texas legislature passed H.B. 889,[30] "opting out" of the new interstate banking system scheduled to

---

> (B) the branch resulted from -
>
> (i) an interstate merger transaction approved pursuant to Section 1831u of this title; or
>
> (ii) a transaction after May 31, 1997, pursuant to which the bank received assistance from the Federal Deposit Insurance Corporation under section 1823(c) of this title.

[30] H.B. 889 provides, in relevant part, as follows:

> Section 2. Interstate mergers and branches prohibited.
>
> Notwithstanding any other law:
>
> (1) pursuant to Section 44(a)(2), Federal Deposit Insurance Act . . . a domestic bank may not engage in a merger transaction involving an out-of-state bank;
>
> (2) an out-of-state bank may not establish a de novo branch in this state or acquire a branch in this state by purchase or other means; and
>
> (e) a domestic bank may not establish a de novo branch in a state other than this state or acquire a branch in a state other than this state by purchase or other means.

be introduced by Riegle-Neal. This new opt-out law took effect on August 28, 1995, months after the Comptroller's Decision, and three days after the Bank commenced operations in Texas.

47. The parties disagree over the significance and meaning of the legislative history of Riegle-Neal, and both parties contend that the enactment of the Act supports their respective positions. In addition, Plaintiff and the amici curiae strongly argue that the Comptroller is ignoring the will of the Texas legislature by allowing interstate branching in contravention of HB 889. Plaintiff also argues that the Comptroller's decision subverts the purpose of Riegle-Neal.

48. The Court is of the opinion that the enactment of the Riegle-Neal Act is not as significant to the outcome of this case as the parties appear to believe. The provisions of Riegle-Neal that would apply to this case do not take effect until June of 1997. Further, HB 889 was not in effect at the time of the Comptroller's decision, and as such, that statute cannot form the basis for invalidating the Decision. For similar reasons, the Court declines to adopt the Comptroller's expansive notion that the enactment of Riegle-Neal is evidence that Congress intended an implied recognition of retention of existing branches until May 31, 1997.[31] The Comptroller cannot justify his action on

---

[31] The Court is aware that a portion of the Riegle-Neal House Conference Report states that the Conferees "were aware" that the Comptroller has used Section 30 to approve several transactions which have permitted national banks to move their main offices to other states but to retain branches in the States left by their main offices. See H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 57 (Aug. 2, 1994). As the Commissioners' Amicus Brief notes, prior to passage of the Riegle-Neal Act, the OCC approved only two interstate main office relocations in which the national bank was permitted to retain branches in its old home state. Those decisions were on the applications of American Security Bank, Decision issued February 4, 1994, and First Fidelity Bank, Decision issued January 10, 1994. See Commissioners' Amicus Brief at 22 n. 25; Record at 32 n. 1.

The fact that the Report states that "[t]he Conferees . . . concur with

the basis of a statute that is not yet in effect. The Court believes it unnecessary to further address the significance of Riegle-Neal and HB 889.

3. ESTABLISHMENT OF FORMER MAIN OFFICE AS A BRANCH PURSUANT TO SECTION 36(c)

49. Having concluded that Section 30 does not create an "implied adjunct"[32] allowing for retention of existing branches in contravention of applicable state branching laws, the Court also concludes, for reasons discussed below, that the establishment of the "new" branch at the location of the former main office is not authorized by Section 36(c).

50. Section 36(c) applies to the establishment of new branches. The Comptroller based his authorization of the establishment of the Bank's former main office as a branch on Section 36(c). Section 36(c) allows the establishment of new branches with the approval of the Comptroller "at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question by language specifically granting such authority affirmatively and not merely by implication or

---

those procedures, *including the application of appropriate State law and authority*" and "expect the OCC to continue to follow those procedures until . . . June 1, 1997" (see id.)(emphasis added) does not validate the Comptroller's reliance on retention under Section 30 regardless of the mandates of Section 36. On the contrary, the Conferees reference to "applicable state law" suggests that the Conferees were mindful that Section 30 does not grant additional branching authority from that allowed under Section 36.

[32] See March 8 Decision wherein the Comptroller states that "[w]hen a national bank relocates its main office under [Section 30, it may continue to operate its existing branches as an *implied*, but necessary, *adjunct* to the express authority to move the main office." Record at 6 (emphasis added).

recognition, and subject to the restrictions as to location imposed by the law of the State on State banks." 12 U.S.C. § 36(c)(2).

51. 12 U.S.C. § 36(c) allows national bank branching only to the extent that a state permits branch banking for its own banking institutions. Clarke, 690 F. Supp. at 575 (citing Walker, 385 U.S. 252); Heimann, 633 F.2d at 889. Federal law determines what constitutes a branch bank, but state law determines when, where and how a national bank may branch, if indeed, it may branch at all. Heimann, 633 F.2d at 889 (citations omitted). In determining whether to approve national bank branch applications, the Comptroller must consider all relevant state laws and comply with any requirements established by state statutes. Id. at 890 (citations omitted).

52. "Congress has not entrusted the Comptroller with the power to make policy on the subject of branch banking. The policy-making role in this area is given to state legislatures." First U. Bank & Trust Co., Etc. v. Heimann, 600 F.2d 91, 99 (7th Cir.), cert. denied, 100 S.Ct. 423 (1979). If the Comptroller were allowed to relax state branching standards for national banks, the doctrine of competitive equality would be violated. Id. (citing First National Bank, 385 U.S. 252; Marion National Bank, 418 F.2d at 123-24).

53. The Court finds that the state banking statutes of both Texas and Arkansas are relevant in determining whether the branch authorization was valid under Section 36(c).[33]

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[33] The Court notes that the Comptroller takes the position that only the Arkansas branching statute is relevant to this case because the Bank is situated in Arkansas for Section 36(c) purposes. See Decision at 13. For reasons discussed more fully below, the Court disagrees that the Bank is situated in Arkansas. Therefore, because the Bank is situated in Texas after the relocation, Texas branching laws apply pursuant to Section 36(c).

54. The Court first examines Texas branching law. Although the Bank was "situated in Texas" by virtue of the main office relocation, as required by Section 36(c), the Court finds that the establishment of a branch at the site of the former main office is not authorized under that Section because Texas state branching law did not allow interstate branching.

55. The Texas branching statute that was in effect at the time of the Comptroller's Decision was Tex.Rev.Civ.Stat. Art. 342--903.[34] The Court concludes that the "in-state" language of Art. 342-903 Sec. 1(c) prohibits interstate branching.[35] Upon relocation of the Bank's main office to Texas, the Bank is only authorized to establish an interstate branch to the extent allowed under Texas law. The Court is not persuaded by the Comptroller's insubstantial argument that the absence of the in-state limitation in Section (1)(a) of Art. 342-903 means that

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[34] Art. 342-903 provides, in relevant part, as follows:

> Art. 342-903. Branch Banking
>
> Sec. 1(a) A state bank may engage in the business of accepting demand deposits and making commercial loans at its principal banking office and at any other approved branch office location.
>
> . . . .
>
> (c) Branch offices may be established anywhere *in the state* on prior written approval of the Banking Commissioner.

Tex.Rev.Civ.Stat. art. 342-903 (1)(a) & (c) (West 1994) (emphasis added).

[35] The Court notes that Arts. 342-903 to 342-903a have been repealed. See 74th Leg., ch. 914, § 26(a). The effective repeal date was September 1, 1995, and thus the statute was in effect at the time of the Comptroller's March 8, 1995 Decision.

interstate branching is not prohibited under Texas law. See Decision at 14 n. 8.

56. Similarly, the Court also finds that the establishment of a branch was not permitted under Arkansas branching law.[36] The Arkansas branching provision for Arkansas-chartered banks is found in Ark.Code. Ann. §§ 23-3201202(a) & (b) (4).[37] Under Arkansas law, the Bank may establish a branch anywhere within the county "in which its principal banking office is located." Ark. Code Ann. § 23-32[-]1202)(b)(1).

57. Arkansas' branching statute must be construed in light of

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[36] The Court addresses Arkansas law because the Comptroller based the approval of the new branch application under a faulty analysis of Arkansas law. In addition, the Court agrees with Plaintiff that this case involves the interests of two states -- Texas and Arkansas. The Bank's current operation effects the banking business of two states. See Oral Argument of Steven A. Fleckman.

[37] Ark. Code Ann. §§ 23-32-1202(a) & (b)(4) provides, in relevant part, as follows:

> 23-32-1202 Establishment of full service branch offices -- Locations
>
> (a) No banking institution shall engage in the business of banking at any location other than at a principal banking office or branch bank in this state except as otherwise permitted by law.
>
> . . . .
>
> (b)(1) A bank may establish full service branches and customer-bank communication terminals anywhere within the county in which the establishing bank's principal place of business is located.

Ark. Code Ann. §23-32-1202.

Section 36(c). Specifically, the Court must examine whether the Bank is "situated" in Arkansas, pursuant Section 36(c).

58. The Comptroller relies on Seattle Trust, 492 F.2d at 51, which held that a bank is situated in each state in which it has a main office *or* a branch. According to the Comptroller, in light of Seattle Trust, the Bank is "situated" in Miller County, Arkansas, by virtue of the Bank's retention of its existing branches in that county. Under this tortuous reasoning, the establishment of the new branch at the site of the former main office is allowed under the McFadden Act, and the state branching law of Arkansas which the McFadden Act incorporates.[38]

59. The Comptroller's reasoning is faulty. For the reasons already stated, the Bank was not authorized to retain its existing branches under the "implied" authority of Section 30. Thus, when the main office relocation application was granted, the Bank was (and is) no longer "situated" in Arkansas because it no longer had any lawful branches in Arkansas. Because the Bank is no longer situated in Arkansas, there is no authority to establish a new branch under Section 36(c).

60. The Court further concludes that Defendants' preemption argument is specious. The Defendants argue that even if state

---

[38] The new branch is ostensibly authorized under Arkansas law pursuant to Ark. Code Ann. § 23-32-1202(b)(1) which states that a bank can establish a branch anywhere "within the county in which the bank's principal place of business is located." According to the Comptroller's circular reasoning, under Seattle Trust, the Bank's "principal place of business" is either in Texarkana, Texas (where the main office is located by virtue of the relocation) *or* in Texarkana, Arkansas, because of the pre-existing branches that were allowed to be retained under the so-called "implied adjunct" to Section 30. Too many convoluted intellectual steps must be taken to reach the outcome the Comptroller has reached. In any event, the Bank is no longer "situated" in Arkansas.

law acted as a prohibition on the establishment of the branch at issue in this case, that law would be preempted because it would be in conflict with the authority granted to national banks under federal law in 12 U.S.C. §§ 30 and 36. Decision at 13; Comptroller's Motion at 24-25; Bank's Motion at 15-16. The Court has already determined that there is no "implied" authority for branch retention under Section 30. The Court determined this on the basis of *federal* law, and thus the preemption argument is irrelevant as applied to Section 30. Similarly, as to Section 36, the statute explicitly requires reference and adherence to state law. See Jackson v. First National Bank of Valdosta, 349 F.2d 71, 74 (5th Cir. 1965)(Section 36(c) "is explicit in providing that the substantive law of the state in which [a bank] . . . is located fixes the bounds of such [bank's] branching authority."). Therefore, there can be no conflict between state and federal law as to that Section.

V. CONCLUSION

1. Defendants' Motions to Dismiss or for Summary Judgment are **DENIED**. Plaintiff's Motion for Summary Judgment is **GRANTED**.

2. The March 8, 1995 and August 24, 1995 Decisions of the Comptroller are **SET ASIDE**. See 5 U.S.C. § 706(2).

3. Plaintiff is directed to submit a proposed Judgment by noon, May 31, 1996.

SO ORDERED.
DATED: May 22, 1996.

BAREFOOT SANDERS, JUDGE
UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

(3)

Supreme Court, U.S.
FILED

97 1078 DEC 23 1997

No. ____ OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

CATHERINE A. GHIGLIERI, TEXAS BANKING COMMISSIONER,
Petitioner

v.

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY;
SUN WORLD NATIONAL ASSOCIATION, EL PASO, TEXAS; AND
COMMERCIAL NATIONAL BANK OF TEXARKANA,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Case Nos. 96-50847 and 96-10818

PETITIONER'S APPENDIX VOLUME II

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116 pp

TABLE OF CONTENTS
APPENDIX

A. *Ghiglieri v. Sun World National Association*, Opinion of the United States Court of Appeals for the Fifth Circuit, Case Nos. 96-50847, 96-50948 (July 22, 1997).

B. *Ghiglieri v. Ludwig*, Opinion of the United States Court of Appeals for the Fifth Circuit, Case No. 96-10818 (October 29, 1997).

C. *Ghiglieri v. Sun World National Association*, Memorandum Opinion and Order, United States District Court for the Northern District of Texas (October 29, 1996).

D. *Ghiglieri v. Ludwig*, Findings of Fact and Conclusions of Law of the United States District Court for the Western District of Texas (May 22, 1996).

E. Decision of the Office of the Comptroller of the Currency on the Applications of Sun World, National Association, El Paso, Texas (August 2, 1996).

F. Decision of the Office of the Comptroller of the Currency on the Applications of Commercial National Bank of Texarkana, Texarkana, Arkansas (March 8, 1995).

G. Denial of Petition for Rehearing and Suggestion for Rehearing En Banc, United States Court of Appeals for the Fifth Circuit (September 25, 1997).

H. 12 U.S.C. § 36.

I. ARK. CODE ANN. § 23-32-1202 (Michie 1994).

J. N.M. STAT. ANN. § § 58-1C-4, 58-1C-5, 58-1C-6, 58-1C-7, 58-1C-8 (1996).

K. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, [H.R. 3841] (later, Pub. L. No. 103-328, 108 Stat. 2338 (September 29, 1994)).

L. Joint Explanatory Statement of the Committee of Conference, H.R. CONF. REP. NO. 651, 103d Cong., 2d Sess. 47 *et seq.* (Aug. 2, 1994).

M. Prepared Statement of Chairman D'Amato before Financial Institutions Subcommittee (May 1, 1997).

N. Affidavit of James J. Saxon.

DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATIONS OF

SUN WORLD, NATIONAL ASSOCIATION, EL PASO, TEXAS

August 2, 1996

I. INTRODUCTION

On May 9, 1996, Sun World, National Association, El Paso, Texas ("Sun World") filed an application with the Office of the Comptroller of the Currency ("OCC") for approval to change the location of its main office from El Paso, El Paso County, Texas, to Santa Teresa, Dona Ana County, New Mexico, under 12 U.S.C. § 30 (the "Relocation Application"). The location in Santa Teresa is approximately one-half mile from the city limits of El Paso. During and after the relocation of its main office, Sun World would retain its two existing branches in El Paso. On May 9, 1996, Sun World also applied to the OCC for approval, following the relocation of its main office, to establish a new branch at the former location of its main office in El Paso under 12 U.S.C. § 36(c) (the "Branch Application").

Sun World has approximately $134 million in assets and $111 million in deposits and currently operates two branches in El Paso. Sun World is a subsidiary of NationsBank Texas

Bancorporation, Inc., which is in turn a subsidiary of NationsBank Corporation, a multi-state bank holding company headquartered in Charlotte, North Carolina.

Notice of the Applications was published in a general circulation newspaper in El Paso on May 8, 1996. In addition, Sun World sent copies of the Applications to the banking commissioners of Texas and New Mexico. On May 20, 1996, and on June 10, 1996, the Texas Bank Commissioner ("Texas Bank Commissioner" or "the Commissioner") wrote the OCC to oppose the Applications, objecting especially to Sun World's retention of its existing branches in Texas when it relocates its main office to New Mexico. On June 4, 1996, the New Mexico Director of the Financial Institutions Division ("New Mexico Bank Commissioner") also wrote the OCC to oppose the Applications, making essentially the same points as the Texas Commissioner. On June 4, 1996, the Independent Bankers Association of Texas ("IBAT") also wrote the OCC to oppose the Applications. Sun World responded to the above objections in letters dated June 6, June 11, and June 20, 1996. The objections are addressed in the relevant portions of the discussion below, especially at pages 22-34, 36-37, and 38-41.

Recently, the Texas Bank Commissioner brought suit against Sun World in the Western District of Texas to litigate the banking operations Sun World proposes in its Applications, even before the Applications had been acted on by the OCC. See Ghiglieri v. Sun World, N.A., EP-96-CA-324 (W.D. Tex., Complaint filed July 18, 1996). With the issuance of our Decision today approving Sun World's Applications, the OCC will move to intervene in this case.

The Texas Bank Commissioner's objections to these Applications are similar to her objections to an earlier interstate

main office relocation from Arkansas into Texas that is the subject of a lawsuit. In that case, the district court concluded that the OCC's interpretation of 12 U.S.C. § § 30 & 36 as permitting a national bank to keep its existing branches when it relocates its main office across state lines was erroneous. See Ghiglieri v. Ludwig, No. 3:95-CV-2001-H, 1996 U.S. Dist. LEXIS 8321 (N.D. Tex., May 22, 1996), appeal docketed, No. 96-10818 (5th Cir. July 10, 1996)("Ghiglieri")[1]. The OCC believes the district court opinion in Ghiglieri is incorrect as a matter of law for several reasons. Most significantly, the court did not follow the language of the statutes in effect at the time of the OCC's decision and ignored highly relevant recent legislative history which illuminates the literal language of sections 30 and 36. In addition, the court failed to follow the standards set by the United States Supreme Court for judicial review of an agency's construction of the statutes it administers. See NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co., 513 U.S. __ (1995); Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). These standards were recently, emphatically, re-affirmed by the High Court in a decision handed down subsequent to the district court's opinion. See Smiley v. Citibank (South Dakota), N.A., No. 95-860, 517 U.S. __, 135 L.Ed.2d 25 (June 3, 1996). The district court opinion is discussed at pages 12, 21, 22-34, 36-37, and 39.

The judgment entered in Ghiglieri does not limit the OCC's ability to act on Sun World's Applications, however.

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[1] The Ghiglieri court was reviewing the OCC's Decision on the Applications of Commercial National Bank of Texarkana (OCC Corporate Decision No. 95-11, March 8, 1995) ("OCC Commercial National Bank Decision").

The judgment enjoins the OCC only from approving other applications like the one at issue in that case -- i.e., to relocate a national bank's main office from Arkansas into Texas, where the bank would continue, after the relocation, to maintain interstate branches in Arkansas. In the proceedings in the Ghiglieri case, the Texas Bank Commissioner twice tried, but failed, to obtain an order that would have covered other interstate relocations involving Texas, such as Sun World's.

First, the Commissioner offered a proposed judgment that would have enjoined the OCC from approving any further bank application to relocate its main office while continuing to maintain interstate branches in violation of Texas law. See Commissioner's Proposed Order (May 31, 1996). The OCC offered a narrower proposed order, limiting the order to the fact pattern before the court (i.e., branch retention following a main office relocation from Arkansas into Texas). See OCC's Proposed Order and Memorandum in Support (June 7, 1996). The court adopted the OCC's narrower order. See Judgment (June 10, 1996).

Second, after the narrower order was entered, the Commissioner tried to amend the judgment to enjoin the OCC from approving any further application to relocate a national bank's main office into or from Texas where the bank would maintain interstate branches, where the maintenance of the branches is based on branch retention under section 30. See Commissioner's Motion to Amend Judgment (June 17, 1996). In her motion to amend, the Commissioner specifically referred to the pending application by Sun World to relocate from Texas to New Mexico. Nevertheless, the court denied the Commissioner's motion to amend and left the original narrower order in place. See Order Denying Plaintiff's Motion to Amend

Judgment (June 26, 1996). Thus, the Ghiglieri court had the opportunity to include the Sun World Applications within the scope of its Judgment, but did not.

The provisions of the Riegle-Neal Act[2] governing interstate main office relocations and branch retention create a highly unusual interplay between potential OCC action on applications before us and the status of pending litigation. As discussed below at pages 17-19 and 28-29, the Riegle-Neal provisions apply a different, and narrower, standard for permissible branch retention in interstate main office relocations that occur after May 31, 1997, than for those that occur until then. If a national bank, such as Sun World, relocates its main office from one state to another after May 31, 1997, its power to retain its existing branches in the first state will be determined by the more limited standard governing relocations after that date. In other words, a relocation with branch retention that could be permissible under today's standards might become impermissible under the post-May 31, 1997, standards.[3] It is

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[2]Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (enacted September 29, 1994) (codified in scattered sections of 12 U.S.C.) (the "Riegle-Neal Act").

[3] At the present time, Sun World's is the only pending interstate main office application involving Texas. A small Oklahoma bank had applied before Sun World, but it recently withdrew its application. However, there may be other banks that might consider such applications but are deterred by the legal uncertainty and potential risk of litigation. Thus, it is desirable to have the issue resolved in a timely fashion before May 31, 1997.

the scope of the current standard that is at issue in the Ghiglieri case.

At the present time, however, it is impossible to say whether the scope of the current standard will be resolved by the courts before the standard expires on May 31, 1997. The OCC is appealing the decision in Ghiglieri to the United States Court of Appeals for the Fifth Circuit. See Notice of Appeal (July 10, 1996). Moreover, because of the short time remaining until May 31, 1997, and the need to have the law settled before then, the OCC will move for an expedited appeal. However, at this time it is uncertain when the appeal will be heard and decided, and when any subsequent review of that decision would conclude. In particular, it is not certain that the issue will be resolved before June 1, 1997. If the OCC declined to act on Sun World's applications until these issues were finally determined on appeal, the time might extend past May 31, 1997. Then, even if the OCC prevailed, Sun World's ability to take action determined to be validly authorized under pre-May 31, 1997, law would be foreclosed. These unique circumstances make it necessary for the OCC to act, so that Sun World is not deprived of a right it, and the OCC, believes it has under current federal law and so that the issues in dispute are able to be fairly presented for judicial resolution. The validity of the OCC's statutory construction and Sun World's claim that it can relocate to Santa Teresa and retain the two existing branches in El Paso may then be determined in the courts.

II. LEGAL AUTHORITY

These Applications involve a series of two transactions:

(1) The relocation of a national bank's main office from El Paso, Texas, to Santa Teresa, New Mexico, and the bank's retention of its two existing branches in El Paso, under 12 U.S.C. § 30.

(2) The relocated bank's establishment of a new branch at the former site of its main office in El Paso, under 12 U.S.C. § 36(c).

These transactions present but one central legal issue: the power of a national bank to retain its existing branches when it moves its main office. The interstate relocation of the main office in itself is well-established, as set out at pages 7-12. If the branch retention in the relocation is authorized, then Sun World can become an interstate national bank (i.e., a bank with branches in another state). Then, in the second transaction, the statutes governing the establishment of new branches by national banks are simply applied to the interstate bank. But, without the branch retention in the relocation transaction, there is no basis to proceed to the second transaction.

Thus, the central legal issue is a national bank's power to retain its existing branches in an interstate relocation of its main office. In 1994, Congress expressly addressed this very issue and confirmed the OCC's prior interpretation of the statutes. In two decisions in early 1994, the OCC determined that the bank could continue to operate its existing branches in its original state when it relocated its main office to another state under section 30, without regard to section 36 or state law.[4]

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[4] See Decision on the Applications of American Security Bank, N.A., Washington, D.C., and Maryland National Bank, Baltimore, Maryland (OCC Corporate Decision No. 94-5, February 4, 1994), reprinted in [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,695 ("OCC

We based this statutory conclusion on consideration of many factors, including an extensive review of the statutes, legislative history, case law, the development of the statutes, and the impact of branch retention vowel non on the exercise of the primary statutory right to move the main office. We found nothing that required existing branches to be divested in a main office relocation, and concluded a congressional intent to require such divestiture could not be inferred from silence. The OCC's statutory construction of section 30 before the Riegle-Neal Act is summarized at pages 14-16.

In the Riegle-Neal Act, Congress visited section 30 after the earlier OCC decisions and added new language to 12 U.S.C. § § 30 & 36 to clarify and govern the power of national banks to have interstate branches through retaining existing branches in an interstate main office relocation. This action recognized that,

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NationsBank/Maryland National Decision"); Decision on the Applications of First Fidelity Bank, N.A., Pennsylvania, Philadelphia, Pennsylvania, and First Fidelity Bank, N.A., New Jersey, Newark, New Jersey (OCC Corporate Decision No. 94-04, January 10, 1994), reprinted in [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,644 ("OCC First Fidelity/New Jersey Decision"). There were also other decisions before the Riegle-Neal Act that involved only the interstate relocation of a bank's main office (i.e., the bank did not have branches to retain). See Decision on the Applications of the First National Bank of Polk County (OCC Corporate Decision No. 94-21, April 28, 1994) (relocation from Tennessee into Georgia); Decision on the Application of the First National Bank of Spokane (1991) (relocation from Washington into Idaho); Decision on the Application of South Trust National Bank (1989) (relocation from Alabama into Georgia); Decision on the Application of the Bank of New Jersey, N.A. (1986) (relocation from New Jersey into Pennsylvania) ("OCC Bank of New Jersey Decision"); Decision on the Application of Mark Twain Bank, N.A. (1985) (relocation from Missouri into Kansas)("OCC Mark Twain Decision").

under section 30, national banks had such power before, and then limited it, beginning on June 1, 1997, to co-ordinate the section 30 power with the new Riegle-Neal framework for interstate branches. *Section 30, as so amended, is the statute that applies to transactions today*. Before the Riegle-Neal Act, nothing in sections 30 or 36 required the constructive divestiture of existing lawful branches in a main office relocation. In the Riegle-Neal Act, Congress added such a requirement, but only for certain interstate relocations and only to begin on June 1, 1997. Congressional action on section 30 in the context of the prior OCC interpretation is especially compelling. Thus, in the relocation of its main office from one state to another, the power of a national bank to retain its existing branches under section 30 is now clearly established. Section 30 and the Riegle-Neal Act are discussed at pages 17-34.

Once Sun World is an interstate national bank with two branches in El Paso, the establishment of the new branch in El Paso at the former site of the main office is evaluated under the statutes, cases, and prior OCC decisions for such transactions by an interstate bank. Before the Riegle-Neal Act, there had been a number of decisions applying the applicable federal branching and merger statutes to transactions by interstate national banks.[5]

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[5] The OCC First Fidelity/New Jersey Decision and the OCC NationsBank/Maryland National Decision had involved such transactions after the relocation, and there were also several other applications that did not involve a relocation but did involve interstate merger and branching transactions. See Decision on the Application to Merge Girard Bank, Bala Cynwyd, Pennsylvania, in Heritage Bank, N.A., Jamesburg, New Jersey, with the Title of Mellon Bank (East) N.A. (March 27, 1984), reprinted in [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶99,925 ("OCC Mellon Decision") (in 1984 Heritage had a grandfathered branch in Philadelphia; the 1984 transaction was not consummated

In the pre-Riegle-Neal decisions, the OCC determined that, when the federal statutes refer to state law, they were intended to apply state laws on a state-by-state basis for transactions in each state by an interstate national bank. That is, an interstate bank could establish new branches within each state under section 36(c), depending upon that state's law for in-state branching for its own state-chartered banks. In the Riegle-Neal Act, Congress left these statutes unchanged after this OCC interpretation and, in the new Riegle-Neal interstate provisions, adopted a similar state-by-state framework for subsequent transactions by a Riegle-Neal interstate bank. Sun World's establishment of the new branch in El Paso is discussed at pages 34-37.

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and Heritage later became part of Midlantic National Bank); Decision on the Application of State Savings Bank, Southington, Connecticut, to Convert into a National Banking Association, State Savings Bank, N.A., and Merge into Connecticut National Bank, Hartford, Connecticut (OCC Merger Decision No. 91-07, April 8, 1991), available in 1991 OCC Ltr. LEXIS 73 ("OCC Shawmut Decision") (both banks owned by Shawmut National Corporation; at the time of conversion State Savings Bank had branches in Rhode Island); Decision on the Application for the Merger of First Peoples National Bank, Kingston, Pennsylvania, with and into First Fidelity Bank, N.A., Salem, New Jersey (OCC Corporate Decision No. 94-07, February 23, 1994) ("OCC First Peoples Decision"); Decision on the Applications to Merge NationsBank of D.C., N.A., Maryland National Bank, and NationsBank of Maryland, N.A. (OCC Corporate Decision No. 94-22, April 29, 1994) ("OCC NationsBank/D.C.-Maryland Decision"); Decision on the Application for the Merger of Continental Bank, Norristown, Pennsylvania, into Midlantic National Bank, Newark, New Jersey (OCC Corporate Decision No. 94-37, August 12, 1994) ("OCC Midlantic Decision").

Since passage of the Riegle-Neal Act, the OCC has applied these statutes in the foregoing manner in many applications, including decisions in October 1994 shortly after the enactment of the Riegle-Neal Act. In particular, in one decision, a state bank commissioner objected to the transaction, arguing that the maintenance of interstate branches in the state would violate a state law and also raising interpretive questions under the Riegle-Neal Act.[6] In that decision, because of the

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[6] See Decision of the Office of the Comptroller of the Currency on the Applications of Bank Midwest of Kansas, N.A., and Bank Midwest, N.A. (OCC Corporate Decision No. 95-05, February 16, 1995), reprinted in Fed. Banking L. Rep. (CCH) ¶ 90,474 ("OCC Bank Midwest Decision"). Other decisions after the Riegle-Neal Act include: Decision on the Applications of National Westminster Bank USA and National Westminster Bank NJ (OCC Corporate Decision No. 94-43, October 20, 1994) ("OCC NatWest Decision"); Decision on the Applications of First Fidelity Bank, N.A., and The Bank of Baltimore (OCC Corporate Decision No. 94-47, November 4, 1994) ("OCC First Fidelity/Baltimore Decision"); Decision on the Application to Merge Chase Savings Bank into The Chase Manhattan Bank, N.A. (OCC Corporate Decision No. 95-08, February 10, 1995) ("OCC Chase Decision"); Decision on the Applications of American National Bank and Trust Company of Wisconsin and American National Bank and Trust Company of Chicago (OCC Corporate Decision No. 95-12, March 8, 1995); Decision on the Applications of PNC Bank, Northern Kentucky, N.A. and PNC Bank, Ohio, N.A. (OCC Corporate Decision No. 95-13, March 14, 1995) ("OCC PNC/Kentucky Decision"); Decision on the Applications of Firstar Bank Quad Cities, N.A., and Firstar Bank Davenport, N.A. (OCC Corporate Decision No. 95-16, April 27, 1995); Decision on the Application to Merge Bank and Trust Company of Old York Road into Midlantic Bank, N.A. (OCC Corporate Decision No. 95-18, May 25, 1995) ("OCC Midlantic/Old York Decision"); Decision on the Applications of BayBank Connecticut, N.A. and BayBank Boston, N.A. (OCC Corporate Decision No. 95-34, July 26, 1995) ("OCC BayBanks/Connecticut Decision"); Decision on the Applications of PNC Bank, New Jersey, N.A. and PNC Bank, N.A. (OCC

issues raised by the objection, we revisited our analysis of pre-Riegle-Neal law and thoroughly considered the impact of the Riegle-Neal Act on existing authority and the applicability of state law.

Therefore, these Applications by Sun World are similar to a number of prior interstate relocation and branching applications approved by the OCC. Indeed, the objections raised to these Applications by the Texas and New Mexico Bank Commissioners are similar to those raised by the Kansas Bank Commissioner in the OCC Bank Midwest Decision. The legal analysis and authorities set forth in the prior decisions, especially the OCC Bank Midwest Decision, the OCC NationsBank/Maryland National Decision, and the OCC First Fidelity/New Jersey Decision, also apply here.

A. Sun World may Relocate its Main Office to Santa Teresa, New Mexico, and Continue to Operate its Existing Branches in El Paso, Texas, under 12 U.S.C. § 30.

In the Relocation Application, Sun World applied to change the location of its main office from El Paso, Texas, to Santa Teresa, New Mexico, a distance of approximately one-half mile. Sun World will keep and continue to operate its two existing branches in El Paso, Texas. Thus, after the relocation, Sun World will be an interstate national bank operating in two

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Corporate Decision No. 95-36, August 7, 1995); Decision on the Applications of Fleet National Bank, Providence, Rhode Island, et al. (OCC Corporate Decision No. 96-17, March 27, 1996) ("OCC Fleet Decision").

states, with its main office in New Mexico and branches in Texas.

1. The Interstate Relocation of Sun World's Main Office to Santa Teresa is Authorized.

The relocation of Sun World's main office is legally authorized under 12 U.S.C. § 30. Section 30 authorizes a national bank to change the location of its main office to any location within 30 miles of the limits of the city in which its main office is located. 12 U.S.C. § 30(b). Such a relocation, even across state lines, is authorized by the literal language of the statute, and nothing in the legislative history gives any reason not to adhere to the literal language. Section 30 operates independently of section 36, and the authority to relocate a main office is not limited by the McFadden Act. Thus, a main office relocation can result in a national bank having an office at a location where it would not be authorized to establish a branch. Finally, section 30 preempts state laws that conflict with the authority it confers on national banks.

The authority of a national bank to relocate its main office is set out in 12 U.S.C. § 30(b), which provides:

> Any national banking association, upon written notice to the Comptroller of the Currency, may change the location of its main office to any authorized branch location within the limits of the city, town, or village in which it is situated, or, with a vote of shareholders owning two-thirds of the stock of such association for a relocation outside such limits and upon receipt of a certificate of approval from the Comptroller of the Currency, to any other location within or outside the

> limits of the city, town, or village in which it is located, but not more than thirty miles beyond such limits.

12 U.S.C. 30(b) (emphasis added).

Statutory interpretation begins with the language of the statute itself, which must be interpreted in accordance with its plain meaning. See Lewis v. United States, 445 U.S. 55, 60 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). A fundamental canon of statutory construction is that, when a statute's language is clear and unambiguous, the plain meaning of the statute must be applied. See, e.g., Caminetti v. United States, 242 U.S. 470, 485 (1917); Higgins v. Marshall, 584 F.2d 1035, 1037 (D.C. Cir. 1978), cert. denied, 441 U.S. 931 (1979). See generally 2A Sutherland Statutes and Statutory Construction § 46.01 (5th ed. 1992). The OCC, as the agency charged with administering the statute, is bound no less than courts by this canon of construction. "If the statute is clear and unambiguous, 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 368 (1986) (quoting Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)). Moreover, the legislative history of section 30 provides no basis for departing from the plain meaning of the statute. See OCC Bank Midwest Decision (Part II-A-1-b) (review of legislative history of section 30 from enactment in 1886 through 1959 amendment that removed language limiting relocations to places within the same state to

1982 amendment that was the last change prior to the Riegle-Neal Act).

Under the "plain meaning" rule of statutory construction, then, section 30 clearly permits a national bank to relocate its main office to any location within 30 miles. See State of Idaho Department of Finance v. Clarke, 994 F.2d 1441, 1444 (9th Cir. 1993) (interstate relocation); Synovus Financial Corporation v. Board of Governors of the Federal Reserve System, 952 F.2d 426, 428 & n.1, 435 (D.C. Cir. 1991) (interstate relocation); McEnteer v. Clarke, 644 F.Supp. 290, 292 (E.D. Pa. 1986) (interstate relocation). See also Ramapo Bank v. Camp, 425 F.2d 333, 344 (3d Cir.), cert. denied, 400 U.S. 828 (1970) (in-state relocation). The plain language in section 30 authorizes a national bank to relocate its statutory "main office" to "any other location" within thirty miles of the limits of the city in which the main office is currently located. This authorization for relocations within 30 miles contains no limitation or other references to state borders or to state law. The proposed main office location in Santa Teresa, New Mexico, in the Relocation Application is approximately one-half mile from El Paso. Thus, on its face, section 30 authorizes the proposed main office relocation.

The proposed location in Santa Teresa will meet the criteria to be a main office under section 30. Section 30 does not define the term "main office." The term also is not defined elsewhere in the National Bank Act. Nor does the National Bank Act impose any specific requirements or criteria for a national bank's main office. However, examination of the original version of section 30, related statutes, and the historical introduction of the term "main office" reveals its intended meaning. The bank's main office is the office designated as

such in its articles of association -- i.e., the office that is the registered location of the corporation as distinct from its branches -- provided only that it conducts a banking business at such office. There is no requirement in statute or case law that the bank conduct the principal portion, or any required minimum portion, of the bank's business at the "main office" rather than at one of its "branches." Indeed, the volume and nature of business conducted at the location is not an appropriate determinant of a valid main office because those factors can be affected by external events that have no connection to the original designation. For example, changing demographics in the market area and changes in local business patterns may cause business at one site (the main office) to shrink, while business at other sites (branches) increases. This interpretation of "main office" in section 30 is confirmed in judicial decisions, prior OCC practice, and analogy to general corporate law. This issue is set out more fully in the OCC First Fidelity/New Jersey Decision (Part II-A-1, pages 12-17) and the OCC Bank Midwest Decision (Part II-A-1-a, pages 12-15).

An extensive discussion of this issue appears in Ramapo Bank v. Camp, 425 F.2d 333 (3d Cir.), cert. denied, 400 U.S. 828 (1970). In Ramapo Bank, a national bank proposed to relocate its main office to another town (at a location where it could not establish a branch) and to establish a branch at the site of the original main office. The plaintiffs argued that the proposal was a subterfuge to evade the McFadden Act by locating a "main office" where the bank could not locate a "branch." (The McFadden Act issue is discussed below.) In particular, they argued the proposed new main office was not a bona fide main office, but was in economic substance a branch, because the former main office would continue to exist as a

branch and would serve the bulk of the bank's existing customers. 425 F.2d at 340.

The court rejected plaintiffs' arguments and cited with approval the criteria used by the OCC in determining that the relocated main office was bona fide. All these criteria relate to the legal characteristics that differentiate a main office from a branch, not business differences. See Ramapo Bank, 425 F.2d at 341. The court also considered the volume of business that would be transferred to or conducted by the relocated main office, because the plaintiffs argued that the relocated main office would not conduct a sufficient volume of business. The court, however, dismissed this as a factor in reviewing the legal authority for the main office and agreed with the OCC's analysis that factors such as the number of customer accounts, addresses of customers, business volume, or size of the office were not relevant to its status as the main office. See id. at 342.

In the present Relocation Application, just as in Ramapo Bank, Sun World's proposed main office will have the legal characteristics of a main office. The Santa Teresa office will provide a full range of banking services. It will be designated as the main office in Sun World's articles of association. It will be the main office for all legal purposes, including receipt of service of process. It will be the official mailing address for the bank. In addition, the Santa Teresa office also will maintain the principal corporate books and records of the bank such as charter documents, corporate seals, minutes of directors and shareholders meetings, tax returns, and regulatory reports. Thus, the proposed location in Santa Teresa clearly satisfies the legal criteria for a main office. It properly will be Sun World's "main office" under section 30.

It also has been argued in the past that section 30 should not be interpreted so as to allow a bank to obtain, through main office relocation, a configuration of offices that it could not establish as branches under section 36(c). That is, the bank should not be permitted to move its main office to a location at which the bank could not establish a branch from its old main office. In this interpretation, section 30 would not be given full literal effect, but would be understood as impliedly limited by section 36(c). The OCC has rejected this view. See, e.g., OCC Bank Midwest Decision (Part II-A); OCC NationsBank/Maryland National Decision (Part II-A & II-B); OCC First Fidelity/New Jersey Decision (Part II-A & II-B). Before the Riegle-Neal Act, most courts did not follow this approach. Congress' recent action in the Riegle-Neal Act confirmed the OCC's interpretation of section 30 (discussed below in section A-2).[7]

The overwhelming weight of case precedent supports the interpretation that section 30 must be given its literal meaning and that it alone governs main office relocations. Courts repeatedly have held that section 30 operates independently of the McFadden Act and other statutes. See, e.g., Ramapo Bank, 425 F.2d at 340-46 (section 30 independent of McFadden Act

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[7] As discussed further below in section A-2, in the Riegle-Neal Act Congress amended section 30 to limit a national bank's power to keep branches in its former state when it relocates its main office to another state, beginning on June 1, 1997. In so doing, Congress recognized that section 30 authorizes national banks to relocate their main office across a state line and did nothing to change section 30 in that respect.

and state law); Traverse City State Bank v. Empire National Bank, 228 F.Supp. 984, 992 (W.D. Mich. 1964) (section 30 independent of McFadden Act and state law); Bank of Western Oklahoma v. First National Bank of Sayre, No. CIV-95-1930-A (W.D. Okla. July 29, 1996). See also McEnteer, 644 F.Supp. at 292-94 (section 30 independent of state law and Bank Holding Company Act). Cf. Synovus Financial Corporation, 952 F.2d at 434-36 (section 30 independent of Bank Holding Company Act). But see Marion National Bank of Marion v. Van Buren Bank, 418 F.2d 121, 124 (7th Cir. 1969) (using section 36 to limit section 30) (discussed below).[8]

Several courts have considered the interplay between section 30 and section 36(c) with respect to the issue of the location to which the main office could be located if the bank were simultaneously applying to establish a new branch at its former main office location. In Ramapo Bank the United States Court of Appeals for the Third Circuit upheld the OCC's approval of a main office relocation to an adjacent town along with the establishment of a branch at the site of the former main office. Under state law neither the relocation nor the establishment of a branch at the new main office location would

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[8] The district court in Ghiglieri followed Marion National Bank for the general proposition that section 30 must be read in conjunction with section 36, with section 36 limiting section 30, and then applied that proposition to the issue of the relocating bank's authority to keep its existing branches in Arkansas. But the court also found the bank was authorized to relocate the main office itself from Arkansas into Texas. The court's reliance on Marion National Bank was misplaced because Congress has now addressed the relationship of sections 30 and 36 when it amended the sections in the Riegle-Neal Act. The Ghiglieri decision is addressed separately below in section A-2.

have been permissible for a state bank, but a bank originally at the new main office location could establish a branch at the old main office location. Consequently, the issue raised was whether, by operation of the McFadden Act, 12 U.S.C. § 36, state law branching restrictions were applicable to relocations by national banks under section 30. Opposing the relocation, the plaintiff argued the relocation was merely a subterfuge to circumvent state branching restrictions and establish an impermissible branch location in an adjacent community. The plaintiff also argued the doctrine of competitive equality prohibits approval of a relocation that would not be permissible for a state bank.

The Ramapo Bank court rejected both of these arguments. The court upheld the decision of the Comptroller that the relocation was bona fide and not subject to state branching laws. Most importantly, the court refused to incorporate the McFadden Act and state law restrictions into the clear and unambiguous language of section 30:

> We agree with the holding in [Traverse City State Bank] that Section 30 controls with respect to an application for a national bank's main office relocation free of the impact of state banking laws or policy, and that administrative approval of such an application must be sustained if it is not arbitrary, capricious or an abuse of discretion, and it is supported by substantial evidence. It is certainly not within our province to pass upon the wisdom or desirability of Section 30. That Congress has the power to exempt national banks from state regulation is unquestioned. That Congress has done so with regard to the relocation of the main offices of nationally chartered banks is equally certain, both from the lack of

> express language to the contrary in Section 30, and the absence of contrary suggestion in the congressional history of the National Bank Act, or Section 30 in particular.

425 F.2d at 344 (footnotes and citations omitted).

In particular, the Ramapo Bank court specifically considered the argument that there should be a conjunctive reading of sections 30 and 36(c) in an application for a main office relocation when the existing main office would be retained as a branch. 425 F.2d at 344. In a careful analysis directed to the then-recent Marion National Bank case, the court rejected this argument. The two statutes have separate scope and purpose. Their language and legislative history give no evidence that they were intended to be construed together. Judicial precedent relating to the interpretation of section 36 on matters within its scope is inapposite on the question of whether section 36 is meant to limit section 30. 425 F.2d at 344-46. The Ramapo Bank court concluded:

> Thus, we are of the opinion that branching considerations are inapplicable to the main office relocation of a national bank, and that the bona fides of the relocation is governed solely by the statutory provisions of Section 30 of the National Bank Act.

425 F.2d at 345 (footnote omitted).

The Traverse City State Bank court upheld the OCC's approval of a national bank main office relocation that opponents similarly challenged as inconsistent with state branching law. The court, noting that section 30 is self-contained and, unlike the McFadden Act, does not incorporate state law, declared that:

> It was apparently the intent of Congress not to limit the relocation of main offices of national banking associations by reference to state banking laws, since there is no such limitation [in 12 U.S.C. 30].
>
> If we were to hold [that main office relocations are subject to state law], as plaintiffs urge us to do, we would write into Section 30 of the National Banking Act that which Congress decided not to include in the Act. This court thus would be legislating and usurping the power of Congress.

228 F.Supp. at 992 (emphasis in original). Two other district court cases have followed the same analysis and reached the same result as Ramapo Bank and Traverse City State Bank. See First National Bank & Trust Co. v. Smith, No. K75-19 (W.D. Mich. Sept. 28, 1977); Merchants and Miners Bank v. Saxon, No. 1042 (W.D. Mich. July 13, 1966) (discussed in Ramapo Bank, 425 F.2d at 343).

Finally, in a more recent case involving the interstate relocation of a national bank's main office from New Jersey into Pennsylvania, it was argued that section 30 did not authorize the relocation because it would violate state law and the Douglas Amendment of the Bank Holding Company Act. While the case did not involve the McFadden Act, the court followed the earlier cases in construing section 30 as independently governing national bank main office relocation free of any impact of state banking law or policy. McEnteer, 644 F.Supp. at 292-93 (following Ramapo Bank). In reaching its decision, the court applied the plain language of section 30:

> The plain language of the statute allows national banks to relocate "to any other location" within 30 miles of the

> limits of the city, town, or village within which it is currently located. The proposed relocation complies with that requirement, and [the court] will apply the plain language of the statute. There is no ambiguity in the statute.

McEnteer, 644 F.Supp. at 292.

Before the OCC's decisions in early 1994, only one court reached the opposite result and made main office relocations subject to the McFadden Act and state law. Marion National Bank, 418 F.2d at 124.[9] In Marion, in circumstances similar to those in Ramapo Bank and Traverse City State Bank, a national bank applied to relocate its main office to a nearby

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[9] Recently, the Ghiglieri court followed Marion National Bank. The court's reliance on Marion was misplaced because Congress has now addressed the relationship of sections 30 and 36 when it amended the sections in the Riegle-Neal Act. The Ghiglieri decision is addressed separately in section A-2 below. Another earlier case involving a proposed main office relocation application cited Marion. See First National Bank of Southaven v. Camp, 333 F. Supp 682 (N.D. Miss 1971), aff'd without opinion, 467 F.2d 944 (5th Cir. 1972). There, the Comptroller had denied a bank's applications to move its main office to another town and establish a new branch at its former main office location in circumstances similar to the applications in Marion and Ramapo Bank. In FNB Southaven, the district court held the denial was within the administrative discretion granted the Comptroller. See 333 F.Supp. at 686-88. In *dicta*, the court also discussed the conflict between Marion and Ramapo Bank, but determined it need not adopt either interpretation in the circumstances of the case before it, holding only that, within the Comptroller's discretion in administering applications under the national banking laws, the Comptroller may consider the relationship of the two applications and state law factors, even when not required to. Id. at 689-90.

town and to establish a new branch at the location of its former main office. State law would not permit a new branch to be established at the proposed new main office location. The Marion National Bank court conceded that the relocation in itself would be lawful under section 30, but then concluded that because the transaction as a whole meant that a bank ended up with a new facility where it could not establish a branch, the transaction as a whole must therefore fail on McFadden Act grounds. 418 F.2d at 124. As explained above and also discussed in Ramapo Bank, the Marion National Bank court's analysis fails to give effect to the literal language of section 30 and assumes -- without any evidence or support -- that section 36 is both germane to interpreting section 30 and supersedes it. For these reasons, we believe it is unpersuasive.

As far as we have been able to determine, Ghiglieri is the only court that has followed Marion. Indeed, subsequent to the Ghiglieri court's opinion, in another case raising the relationship of sections 30 and 36(c) in a main office relocation, another district court followed Ramapo and rejected Marion. See Bank of Western Oklahoma v. First National Bank of Sayre, No. CIV-95-1930-A (W.D. Okla. July 29, 1996). The issue in Bank of Western Oklahoma was similar to that in Ramapo and Marion. The First National Bank of Sayre applied to relocate its main office from Sayre to Elk City, while keeping an existing branch in Sayre and moving it to the old main office location. Under the applicable branching law, the bank could not establish a branch in Elk City from its main office in Sayre, but it could have the branch in Sayre from the new main office in Elk City. In its recent decision, the court in Bank of Western Oklahoma followed Ramapo and the other courts that have held that section

30 operates independently of the McFadden Act and state law and rejected Marion. See id. slip op. at 6-7.

Finally, as discussed below, in the amendments it made to sections 30 and 36 in the Riegle-Neal Act, Congress has expressly addressed the relationship between section 30 and section 36 in the context of interstate main office relocations. Since Congress now has addressed the manner in which these two statutes act together, and that manner is different from the position in Marion National Bank, there is no reason to follow that case.[10]

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[10] In some prior main office relocation decisions, the OCC distinguished Marion National Bank by emphasizing the business reasons for the relocation. The presence of business reasons was used to support the validity of the relocation despite alleged inconsistency with State law. However, section 30 does not require a showing of business justification for a relocation. See, e.g., Traverse City State Bank, 228 F.Supp. at 990 (showing of necessity not required for main office relocation). Moreover, this analysis may not clearly distinguish Marion. First, the essence of Marion is that the McFadden Act and State law should apply to and limit section 30 in such cases. Second, it is unlikely a bank would propose a main office relocation unless it had good business reasons for doing so. Rather than attempting to distinguish a flawed case, it is preferable to recognize the case was incorrectly decided, especially now that Congress has established the relationship of sections 30 and 36. See also First National Bank & Trust Co. v. Smith, supra (rejecting Marion and following Ramapo); McEnteer, 644 F.Supp. at 292-93 (following Ramapo). In any event, Sun World has amply demonstrated the business reasons for its proposal. In its application, Sun World notes that Santa Teresa is immediately adjacent to El Paso, the area forms one market, and there is rapid economic development in the Santa Teresa area and Dona Ana County. See Memorandum in Support of Application at pages 3-6 and Attachment A. After these transactions, Sun World will be able to expand its business by offering banking services to residents and businesses in Santa Teresa and to better serve its existing customers who live in Santa Teresa and work in El Paso, or vice versa, and business customers who have operations in both

Thus, national banks are authorized to move their main office to any location within 30 miles, even across state lines. Sun World's proposed main office location in Santa Teresa is approximately one-half mile from El Paso. The relocation of its main office is legally authorized.

2. Sun World's Continued Operation of its Two Existing Branches in El Paso is Authorized under Section 30. Congress Re-affirmed this Authority for National Banks in the Statutory Language and Legislative History of the Riegle-Neal Act.

When it relocates its main office to Santa Teresa, New Mexico, Sun World will continue to operate its two existing branches in El Paso, Texas. In four of the OCC's earlier decisions involving the relocation of a national bank's main office across a state line and the continuation of existing branches in the original state, we extensively analyzed the legal authority for the continued operation of existing branches and concluded that continued operation of such existing branches is legally authorized. In two decisions before the Riegle-Neal Act, we considered the meaning and application of sections 30 and 36, as they then existed, and concluded that section 30 conveyed the authority to keep existing branches when the main office relocated. See OCC NationsBank/Maryland National Decision (Part II-B-1); OCC First Fidelity/New Jersey Decision (Part II-B-1).

In two decisions after the Riegle-Neal Act, we considered the changes Congress made to sections 30 and 36.

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places.

With these amendments, enacted by Congress effective September 29, 1994, the statutory language now expressly addresses the retention of branches in an interstate main office relocation. It is the statute as amended that now governs these transactions and on which we rely. Reviewing the statutory language and legislative history, we found Congress had agreed with the OCC's interpretation of section 30, and had taken steps to limit branch retention under section 30 as of June 1, 1997, in conjunction with the implementation of the new interstate branching authority of the Riegle-Neal Act. See OCC Bank Midwest Decision (Parts II-A-2-e & II-D); OCC Fleet Decision (Part II-A-2). Other decisions after the Riegle-Neal Act, including those shortly after enactment, contained a shorter version of the same analysis. See, e.g., OCC decisions cited in note 6. The same analysis applies to the present transaction.

a. Branch retention under section 30 before the Riegle-Neal Act.

When a national bank that has branches relocates its main office under section 30 (whether the relocation is in-state or interstate), the question naturally arises: what is to become of the bank's existing branches? Logically, there are two possibilities: either (1) the branches simply are kept under section 30 and continue as is, or (2) the branches are effectively treated as divested and may be kept only if the bank could establish them as new branches from its new main office location under section 36(c). As a practical matter, this question has significance only in circumstances, such as Sun World's here, in which the bank could not establish its old branches as new branches under section 36(c) from its new main office location. Thus, in practice, this question means the difference between the

bank's keeping its existing branches when it moves its main office or being required to close them.

In 1994, in the interstate main office relocation decisions before the Riegle-Neal Act that involved branches, the OCC examined the statutory language, its legislative history, case law, the overall statutory framework, and its historical development and concluded Congress intended that, when a national bank relocates its main office under section 30, it may continue to operate its existing branches, without regard to section 36 and state law. It is not required to divest existing branches that could not be re-established as new branches by a bank from the new main office location. See OCC NationsBank/Maryland National Decision (Part II-B-1); OCC First Fidelity/New Jersey Decision (Part II-B-1).[11] See also OCC Bank Midwest Decision (Part II-A-2).

As more fully discussed in those decisions, we based this conclusion on a number of considerations, particularly the following. First, the language of neither section 30 nor section 36 (before the Riegle-Neal Act) explicitly addressed what was to happen to existing branches when the main office relocated. Similarly, the legislative history of neither section explicitly addressed the retention of existing lawful branches in a main office relocation. In addition, this issue had not been addressed

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[11] The OCC earlier had reached the same result regarding the retention of existing branches in an in-State main office relocation. See Decision on the Applications of Kentucky National Bank of Marion County and Kentucky National Bank of Pendleton County (July 2, 1991); OCC Letter from Peter Liebesman, Assistant Director, to Martha R. Seger, Commissioner, Michigan Financial Institutions Bureau (May 22, 1981).

in the case law. Ramapo Bank, Traverse City State Bank, and Marion National Bank involved a main office relocation with a simultaneous application to establish a new branch at the former main office location. They did not address the status and retention of existing branches. Thus, this situation required further investigation to determine congressional intent.

Second, section 36 was not the sole and exclusive authority for national bank branches. Instead, as courts had recognized, other statutes can contain branching authority for the specific areas covered by those statutes. See Colorado State Banking Board v. Resolution Trust Corporation, 926 F.2d 931, 946-47 (10th Cir. 1991) (branching provisions of section 1823(k) for emergency thrift acquisitions separate and independent of McFadden Act); Arkansas State Bank Commissioner v. Resolution Trust Corporation, 911 F.2d 161, 173-74 (8th Cir. 1990) (same); State of Texas v. National Bank of Commerce, 290 F.2d 229, 233 (5th Cir.), cert. denied, 368 U.S. 832 (1961) (national bank banking offices on military facilities authorized under 12 U.S.C. 90 without regard to section 36 and state branching restrictions).[12] See also 12 U.S.C. 1823(f)(4)(B) (branches in assisted interstate bank acquisitions). In those cases, the courts rejected the argument that these other statutes must be read in conjunction with section 36, and branches authorized under them only to the extent permissible under section 36. Instead, the courts ruled that the other statutes were independent of section 36. Thus, it was not inconceivable that

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[12] Indeed, under the authority of section 90, a few national banks operated banking facilities on military bases in more than one State, thus having a limited form of interstate branching even before the Riegle-Neal Act.

section 30 also could be such a statute, not for establishing new branches but with respect to retaining existing branches.

Third, in the period before the McFadden Act (i.e., until 1927), there were some national banks with branches (i.e., State banks that had branches and converted into national banks, and successors by merger of such banks). Under the statute that permitted those banks to retain the branches (the predecessor to the current section 36), those branches clearly could be kept if the bank's main office relocated, since the branch statute did not have any geographic limit in it, and so the geographic relationship between the main office and an existing branch location was irrelevant to its permissibility. And so, in the pre-1927 period there was no potential for a "conflict" between retaining existing branches under section 30 and retaining existing branches under the predecessor to section 36. Since the result was the same in either case, it is not surprising that the question of which statute was the source of branch retention authority did not arise then.

Fourth, in 1927, when it enacted the McFadden Act, amending section 36, Congress did not address branch retention in a main office relocation, and so did not evidence intent to change this pre-1927 result or to subject existing branches of a relocating bank to the new section 36. Congress' primary purpose in the McFadden Act was to grant national banks generally the power to establish or acquire new branches, subject to the statute's limits. In various amendments to section 30 and section 36 between 1927 and 1994, Congress similarly has not addressed branch retention in a main office relocation. Moreover, in 12 U.S.C. § 36(b) Congress did address branch retention in other contexts (i.e., conversions and mergers). This shows that, if Congress had wanted to limit or change the

treatment of existing branches, it knew how to do so. However, the addition of geographic limitations to section 36 created the interpretive dilemma now posed: in a main office relocation, are existing branches that were geographically lawful when established simply continued or must they be divested and subjected to a new geographic review based on the new location of the main office.

Fifth, the existing cases on section 30, discussed above, established that section 30 operates independently of section 36. They deal with the locations to which the main office could move and do not directly address the retention of existing branches.[13] (The establishment of a new branch at the old main office location is a different question, addressed below in Part II-B.) Nevertheless, their analysis of the independence of section 30 from section 36 is pertinent. For, if existing branches were not retained under section 30 in a main office relocation but instead were required to be divested and then established anew under section 36 from the new main office location, then section 36 would be indirectly determining the new main office location. Generally, a bank will need to keep its existing branches to continue its banking operations without impairment. If the McFadden Act applies to the ability to keep existing branches, then the locations of existing branches will impose conditions upon where, in reality, the main office can be relocated. This is clearly contrary to the express and

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[13] The cases do not address the issue of retaining the existing branches either because the bank involved did not have an existing branch or because the existing branch was at a location that would be permissible under section 36(c) from either main office location, and so no question was raised.

unconditional language of section 30 and the courts' holding: for section 30 would no longer be independent of the McFadden Act. Since Congress did not condition the exercise of the power to move the main office upon state law or upon the existence or non-existence of branches, there is no basis for implying such a limitation, even indirectly. Cf. Barnett Bank of Marion County, N.A. v. Nelson, No. 94-1837, slip op. at 8, 517 U.S. __, 134 L.Ed.2d 237, 246 (March 26, 1996) (regarding state law and the powers of national banks, "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies").

Finally, we noted that Congress originally enacted section 30, and had subsequently amended it and section 36 several times, without expressly requiring the divestiture, re-examination, or re-authorization of existing branches in a main office relocation. The existing branches of a bank that is relocating its main office were lawful when established. If the bank had to divest all branches that could not be newly re-established from the new main office, then a bank would be penalized for exercising a right granted under the National Bank Act, the right to relocate its main office. We did not believe that such a requirement to surrender existing branching rights, branch buildings, and established customer relationships could be inferred from Congress' silence, since even statutes that expressly affect established property or contract rights are strictly construed. Thus, in the absence of express congressional action requiring that existing lawfully established branches be re-subjected to a de novo analysis under section 36 and divested, we concluded that the intention of the statutory scheme,

considered as a whole, was that existing branches were continued under section 30.

b. Section 30 and the Riegle-Neal Act.

In the Riegle-Neal Act, Congress made this understanding explicit in its amendments of sections 30 and 36. In the language of section 30, effective September 29, 1994, it is clear that national banks are authorized to keep their existing branches when they relocate their main offices. In revisions to section 30, Congress placed a new limitation on this authority in section 30 with respect to certain branches (namely, in an interstate relocation, those branches in the state from which the main office was relocating), but this limitation applies only to transactions occurring after May 31, 1997. In enacting the limitation, Congress recognized that existing branches were retained in main office relocations under section 30 and confirmed that this authority continues for branches not covered by the limitation. And, until June 1, 1997, when the new limitation begins to apply, even branches in the state of the former main office may be retained under section 30. The OCC has so interpreted the Riegle-Neal Act since its adoption. See OCC Bank Midwest Decision (Parts II-A-2-e & II-D); other OCC decisions cited in note 6.

From the OCC's prior approvals and other applications pending at the time the Riegle-Neal Act was under consideration, Congress was aware that the power to retain existing branches in a main office relocation meant that an interstate national bank could occur under that authority. In developing the Riegle-Neal Act, the issue naturally arose whether that authority should be continued or curtailed in light of the new interstate branching authorities being created in the Act. Congress adopted a

compromise. Language was added to section 30 to limit branch retention in an interstate main office relocation, but only for transactions occurring after May 31, 1997. This means not only that the limits added in the new subsection 30(c) do not apply to transactions before June 1, 1997, but also that no limits existed prior to the enactment of section 30(c). Otherwise, Congress would not have found it necessary to deal with the issue.

In the Riegle-Neal Act, Congress added a new subsection (c) to section 30:

> (c) Coordination with Revised Statutes. -- In the case of a national bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State from which the bank relocated such office only to the extent authorized in section 5155(e)(2) of the Revised Statutes [12 U.S.C. § 36(e)(2)].

Riegle-Neal Act § 102(b)(2) (adding subsection (c) to section 30). Congress also added the corresponding new subsection to the Revised Statutes:

> (2) Retention of Branches. -- In the case of a national bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State which was the bank's home State (as defined in subsection (g)(3)(B) [i.e., the State of its former main office]) before the relocation of such office only to the extent the bank would be authorized, under this section or any other provision of law referred to in paragraph (1), to acquire, establish, or commence to operate a branch in such State if --
>
> (A) the bank had no branches in such State;or

(B) the branch resulted from --

(i) an interstate merger transaction approved pursuant to section 44 of the Federal Deposit Insurance Act; or

(ii) a transaction after May 31, 1997, pursuant to which the bank received assistance from the Federal Deposit Insurance Corporation under section 13(c) of such Act.

Riegle-Neal Act § 102(b)(1)(B) (adding subsection (e)(2) to section 36).

These provisions are intended to place a new limitation on a relocating national bank's authority to keep branches in the State of its former main office. Henceforward, from June 1, 1997, a relocating national bank will be able to keep such branches only in accordance with the branching rules in new section 36(e)(2). The legislative history of these changes is especially illuminating. The Conference Report expressly shows that Congress was aware of existing authority and of OCC analyses and approvals under that authority (such as the OCC NationsBank/Maryland National Decision, the OCC First Fidelity/New Jersey Decision, and the other decisions cited in notes 4 & 5 above) and expected it to continue until June 1, 1997:

> The Comptroller of the Currency (OCC) has used the 30 mile relocation provision of the National Bank Act (section 2 of the Act of May 1, 1886, 12 U.S.C. 30), to approve several transactions which have permitted national banks to move their main offices to other States but to retain branches in the States left by the main offices. Section 102(b)(2) amends the

> provision so that after June 1, 1997, a national bank relocating its main office to another state may maintain its branches in the first state only if those branches could have been established by a bank with its home State in the new State. However, along with the OCC's approval for the relocation, the bank would be required to obtain the Comptroller's approval under section 5155 of the Revised Statutes [12 U.S.C. § 36] to continue to operate any remaining branch offices located in State other than the State of its new main office. Thus, the bank would be required to file a consolidated application with the OCC covering both aspects of the transaction; the OCC would be authorized to act on the remaining out-of-State branch aspect of the transaction only pursuant to section 5155. State banks are treated in a similar manner.
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> The Conferees are aware of the OCC procedures in permitting relocation across state lines. The Conferees concur with those procedures, including the application of appropriate State law and authority. The Conferees expect the OCC to continue to follow those procedures until the provisi ns of Title I become fully applicable on June 1, 1997.

H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 57 (August 2, 1994) (Report on H.R. 3841, the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994) (emphasis added).

From the new statutory language and its legislative history, it is clear Congress understood that under existing law a national bank can move its main office across state lines while keeping branches in its former state and that this existing law is being changed by the amendment. While the new subsections 30(c) and 36(e)(2) directly apply only to transactions occurring

after May 31, 1997, their addition to the statute is revelatory of existing section 30. If the antecedent power to retain branches was not present in existing law, there would be no need to impose the limitation. See NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co., 513 U.S. ___, 130 L.Ed.2d 740, 748 (1995) (interpreting 12 U.S.C. § 24(7); "Congress' insertion of the limitation decades after the Act's initial adoption makes sense only if banks already had authority [under the Act]"). This limitation on section 30, which begins on June 1, 1997, would have been unnecessary if other statutory provisions already required a national bank to divest existing branches that could not have been reestablished as branches under section 36(c) following a main office relocation under section 30. Moreover, if Congress did not believe such authority existed, it would hardly have imposed the limitation to begin only on June 1, 1997, rather than immediately. In addition, the limitation is imposed only on the ability to keep certain branches: those in the state of the former main office. In other situations, such as an in-state relocation, Congress did not change the branch retention authority of section 30.

Thus, from the amended statutory language and its legislative history, it is clear Congress understood: (1) that a national bank that relocates its main office keeps its existing branches under section 30, (2) that under existing law a national bank can move its main office across state lines while keeping branches in its former state, and (3) that this existing law is being changed and limited only by the express congressional action in the amendments. In the Riegle-Neal Act, Congress changed the power of a relocating national bank to retain branches in the state of its former main office. But that change

applies only to transactions occurring after May 31, 1997. Branch retention continues unchanged until then.

Moreover, this new statutory language and its legislative history must be viewed in the context of its adoption. In January and February 1994, the OCC had issued two decisions approving interstate main office relocation transactions in which the OCC set out its statutory interpretation that section 30 governs main office relocations, including retaining existing branches, without regard to the McFadden Act. Those decisions were well-known to Congress.[14] When Congress revisits a statute that has an established administrative or judicial interpretation without pertinent change, "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 846 (1986) (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974). See also Cannon v. University of Chicago, 441 U.S. 677, 698-99 (1979) ("[O]ur evaluation of congressional action in 1972 must take into account its contemporary legal context."); Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change, [citations omitted]."); Laufman v. Oakley Bldg. & Loan Co.,

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[14] The two interstate main office relocation decisions to which Congress alluded in the Conference Report (the OCC First Fidelity/New Jersey Decision and OCC NationsBank/Maryland National Decision) had also compiled previous OCC and judicial positions on the subject, including the other OCC decisions cited in notes 4 & 5 above.

408 F. Supp. 489, 496 (S.D. Ohio 1976) ("[W]here prior agency interpretations have not been overturned during subsequent congressional reenactment or amendments, these interpretations take on added importance."). This doctrine has even greater force where, as here, Congress explicitly acknowledged the OCC's interpretation, stated it agreed with the OCC's interpretation, and then changed the statute only in one specific way (and then only for transactions occurring after May 31, 1997). It must be conclusively presumed that Congress intended the statutes to have the meaning as the OCC had interpreted them. Whatever uncertainty may have existed in the statutes on this point before, the Riegle-Neal Act has now clearly established that this was the law.

Finally, in addition to confirming and preserving the section 30 main office relocation authority, Congress also kept that authority separate from the new interstate authorities created in the Riegle-Neal Act, at least until June 1, 1997. In the Riegle-Neal Act Congress authorized interstate branching by national banks through interstate merger transactions (new section 44 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831u) and through de novo interstate branches (new subsection (g) to Revised Statutes 5155, 12 U.S.C. § 36(g)). The interstate merger authority is automatically effective June 1, 1997, but states may "opt-in" early. See 12 U.S.C. § 1831u(a)(3). In addition, states may "opt-out" of the interstate merger provisions by enacting a law to that effect before June 1, 1997. See 12 U.S.C. § 1831u(a)(2). The interstate de novo branching authority is effective if the state where the branch would be has a law that triggers the federal authority. See 12 U.S.C. § 36(g)(1). But Congress addressed interstate branch retention in section 30 relocations in separate provisions of the

Riegle-Neal Act (new 12 U.S.C. § § 30(c) & 36(e)(2)) that do not depend on either of the new authorities. The only connection created by Congress between section 30 and the new Riegle-Neal authorities is that section 36(e)(2)'s new limitation on interstate branch retention under section 30 (which applies to transactions occurring after May 31, 1997) continues to permit branch retention if the relocated bank would be authorized to acquire a branch in the former state of its main office if the branch resulted from an interstate merger transaction under the Riegle-Neal Act's new provision, 12 U.S.C. 1831u. Moreover, while Congress has granted the states authority in determining whether to participate in the new interstate authorities created in the Riegle-Neal Act, Congress did not include any similar grant of state authority in the portions of the Riegle-Neal Act that deal with the pre-existing section 30 authority. And, since Congress kept the section 30 authority separate, a State's action in opting-in to, or opting-out of, the Riegle-Neal authorities has no bearing on the section 30 authority, at least until June 1, 1997.[15] Thus, in Sun World's Relocation Application, the fact that Texas may have adopted legislation with the intent of opting-out of the interstate merger provisions of the Riegle-Neal Act and of not opting-into the interstate de novo branching provisions, see note 30 below, does not affect the bank's power to retain its existing branches in its main office relocation under section 30. The relationship between section 30 and the

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[15] After May 31, 1997, if a State has opted out of interstate merger transactions under 12 U.S.C. § 1831U(A)(2), then the power of a bank relocating its main office out of that State to retain branches in that State under section 30 is curtailed by 12 U.S.C. §§ 30(c) & 36(e)(2).

Riegle-Neal Act is addressed further below in connection with the Texas Bank Commissioner's objections.

Unfortunately, the district court in Ghiglieri mischaracterized the recent amendments to sections 30 and 36. The court mistakenly asserted that the Riegle-Neal Act provisions were not yet in effect and so did not need to be addressed. But in fact, while some parts of the interstate merger and branching provisions in the Riegle-Neal Act (including the amendments to sections 30 and 36) have a date within them (June 1, 1997), when certain standards change, the effective date of the provisions was September 29, 1994, the date of enactment of the Riegle-Neal Act.[16] By ignoring the amendments, the court did not construe and apply the statutes as they existed at the time of the OCC's decision, but as they existed before the Riegle-Neal Act. Indeed, by doing so, the court acted as if it were reviewing the OCC's initial adoption of this statutory interpretation in early 1994, instead of reviewing an agency interpretation that has seen subsequent and intervening congressional action. The goal of statutory construction by agencies and courts, and of judicial review of agencies' construction, is to ascertain the intent of Congress. Where Congress has shown its intent in subsequent amendments of the

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[16] Similarly, the core provision of the Riegle-Neal Act -- namely, the new section 44 added to the Federal Deposit Insurance Act that authorizes interstate merger transactions -- has the June 1, 1997, date within it. On and after that date, interstate merger transactions are authorized unless a State has opted out. But before that date, interstate merger transactions are also authorized, if the States involved have opted-in. Like the amendments to sections 30 and 36, the new section 44 was effective on September 29, 1994, and has a date within it, making a different rule for transactions before that date and after that date.

statute that agree with an agency's interpretation and change the statute to change the agency's interpretation in only one respect, that should be the end of the matter. While the statutes' intended meaning may have been unclear when the OCC initially interpreted them in January 1994, Congress has since addressed the issue, amending the statutes and affirming the OCC's interpretation, in September 1994. In Ghiglieri, the district court mistakenly failed to recognize that the section under which the OCC took its action and the relevant legislative history for that section were addressed by Congress in 1994.[17]

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[17] Although the district court stated the provisions added in the Riegle-Neal Act do not take effect until June of 1997, some might attempt to defend the decision by arguing that, while the provision was effective on September 29, 1994, it does not convey any branch retention authority until June 1, 1997. This would be an argument about the meaning and intent of the current statute. In this interpretation, there was no branch retention authority under section 30 before, and Congress was adding a new power in the amendments to section 30. As discussed further below at pages 28-31, this strained interpretation is mistaken for several reasons. It ignores the significance of the term "only" in new subsection 30(c) (after May 31, 1997, the relocating bank may retain branches in its former state "only to the extent authorized" in section 36(e)(2). The use of this term signifies a limitation, not a new grant of power. This view also ignores the legislative history and contemporaneous context.

Moreover, even if the court had been reviewing an OCCdecision from before the Riegle-Neal Act's amendments to sections 30 and 36, or if the post-Riegle-Neal statutes could be characterized as ambiguous, the district court clearly erred in not deferring to the OCC. See Smiley v. Citibank (South Dakota), N.A., No. 95-860, slip op. at 3, __ U.S. __ (June 3, 1996) ("The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of the rule of deference with respect to his deliberative conclusions as to the meaning of these laws."), quoting NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co., 513 U.S. __, 130 L.Ed.2d 740, 747 (1995). See generally Chevron U.S.A. Inc. v. Natural

Accordingly, when it relocates its main office from El Paso to Santa Teresa, New Mexico, Sun World is legally authorized to continue to operate its existing branches in El Paso.

c. The Texas Bank Commissioner's objections to branch retention under section 30 and the Riegle-Neal Act.

The Texas Bank Commissioner objected to the Relocation Application, because of the continued operation of branches in Texas, disagreeing with the OCC's analysis and conclusions under section 30 and the Riegle-Neal Act. The New Mexico Bank Commissioner and the Independent Bankers Association of Texas ("IBAT") made similar objections. The Texas Commissioner also referred to the district court opinion in Ghiglieri as part of her objection. In the following discussion, we refer to the issues raised in common in all these sources as the Commissioner's objections. Matters raised by only one objector are addressed individually.

The Commissioner claims that, contrary to the OCC's position, there is no authority for a national bank to keep its existing branches when it relocates its main office across a state line under section 30.[18] The Commissioner's arguments for her

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Resources Defense Council, Inc., 467 U.S. 837 (1984).

[18] While the Texas and New Mexico Bank Commissioners contend there is no authority to retain existing branches in a main office relocation under section 30 in general, IBAT appears to concede that the power may exist until June 1, 1997, but claims it does not apply here because Texas enacted legislation

position can be summarized in the following three points: First, there is no authority to retain existing branches under section 30 because national banks' branches are governed exclusively by section 36 (the McFadden Act). The proposed retention of Texas branches is not permitted by the McFadden Act because a bank from New Mexico cannot open branches in Texas. Second, Congress' action with respect to branch retention under section 30 in the Riegle-Neal Act permits branch retention only in transactions in which the branches would be in conformance with the McFadden Act and state law. Third, any broader authority for branch retention in an interstate main office relocation would violate the Riegle-Neal Act because it would permit national banks to have interstate branches by a method other than the two methods provided in the Riegle-Neal Act. The new interstate branching provisions created in the Riegle-Neal Act are intended to be the exclusive means to have a branch in a new state, and so section 30 cannot be an alternate way of having interstate branches. The issues raised by the Commissioner are similar to those raised over a year ago by the Commissioner and other state commissioners concerning other relocation applications. See, e.g., OCC Bank Midwest Decision

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prohibiting interstate branches. Our discussion in this section in general addresses the broader objection. With respect to the narrower objection, we explain why Texas' putative action relative to Riegle-Neal mergers and Riegle-Neal de novo branches has no bearing on the continuation of the relocation authority under the Riegle-Neal Act at page 19 above and pages 30-32 and 39 below. In fact, IBAT's claim would make the limits on branch retention in section 36(e)(2) (which include a reference to the availability of a Riegle-Neal merger to the relocating bank apply to transactions now, before June 1, 1997. But the statute clearly makes the limits apply only to transactions after May 31, 1997.

(Part II-D) (Kansas Bank Commissioner); OCC Commercial National Bank Decision (Texas Bank Commissioner). We will address these points in turn.

i. Even before the Riegle-Neal Act, section 36 did not govern all aspects of national bank branches and, in particular, did not limit the retention of existing branches after a main office relocation.

The Commissioner's first argument is that section 36 is the exclusive source of branching authority for national banks and there is no authority to retain existing branches under section 30, unless the branches would have been permitted as branches under section 36. This is the Commissioner's principal argument. But, in making it, the Commissioner presents the arguments that section 36 should apply to, and limit, branch retention in a main office relocation as those arguments would have been presented in the past, as if Congress did not address and settle this question in 1994. Today, after the Riegle-Neal Act, there are more current and more probative manifestations of congressional intent: the amendments to the sections, the legislative history, and congressional action after the OCC's interpretation. The Commissioner disagrees with the OCC's interpretation and presents now the arguments that could have been raised against that interpretation in early 1994. But it is the OCC's interpretation of sections 30 and 36 that Congress had before it when it amended those sections in the Riegle-Neal Act.

Even though these pre-Riegle-Neal arguments about the meaning of sections 30 and 36 have been overtaken by later developments, they are the main focus of the Commissioner and

the Ghiglieri court. Accordingly, we address them, particularly to place the Riegle-Neal amendments in context and to show again that the OCC's pre-Riegle-Neal statutory interpretation (summarized at pages 14-16 above) was reasonable.

The Commissioner asserts that allowing a bank to keep existing branches in its original state when it relocates its main office violates the limitations on branching set forth in the McFadden Act, 12 U.S.C. 36. According to the Commissioner, section 30 was never intended to provide the means for national banks to branch, and so it cannot be used to result in an interstate branch network. The Commissioner and the Ghiglieri court also note that section 30 does not expressly address branch retention and that section 36 addresses branch retention in other circumstances (i.e., grandfathered branches, conversions, and consolidations), but not in main office relocations. (This was true of sections 30 and 36 before the Riegle-Neal Act, but now, pace the Ghiglieri court, sections 30(c) and 36(e)(2) do expressly address branch retention in an interstate main office relocation.) The Commissioner claims that when it enacted the McFadden Act in 1927, Congress made it the exclusive authority by which national banks could establish branches thereafter, and that it provided for establishing branches only within their home states. Moreover, in section 36 Congress made national banks' authority to establish branches depend upon state law permitting branches for state banks. Prior to the McFadden Act, in 1924 the Supreme Court held that national banks did not have an implied general power to branch, see First National Bank in St. Louis v. Missouri, 263 U.S. 640 (1924), and so national banks could establish branches only under a specific statutory authorization. Thus, the Commissioner argues, unless a branch is authorized under the

McFadden Act, it is not permissible for a national bank, and since a national bank in New Mexico could not establish a branch in Texas under the McFadden Act, Sun World cannot keep its branches in Texas when it relocates its main office.

However, the Commissioner's argument here mischaracterizes the OCC's position. The OCC does not claim that section 30 is an authority for national banks to establish branches. Rather, the issue in the OCC's section 30 decisions is whether pre-existing already lawfully established branches must be treated as if they were divested when the main office relocates and the ability of the bank to have branches at those locations tested as if the bank had never been located there before. The branches themselves were each established (at the earlier time when they were established) under the applicable provisions of the McFadden Act or other law. Then, later when the bank applies to relocate its main office, the question arises whether the bank may keep its existing branches or, as part of relocating its main office, it must give up its existing branches and have the relocated bank re-establish them anew. In the analysis in the relocation decisions, we concluded that the existing branches did not have to be effectively divested and reestablished, but that any subsequent new branches, including a branch at the former location of the main office, would have to be established under section 36 by the relocated bank. See, e.g., OCC First Fidelity/New Jersey Decision (Part II-B-1); OCC Bank Midwest Decision (Part II-A-2). Since this is an issue of the authority to retain existing lawfully established branches, not the authority to establish new branches, the fact that the McFadden Act might once have been the exclusive means to establish new branches (even assuming that proposition to be true) and the holding in First National Bank in St. Louis that

national banks had no implied general power to establish branches are simply not germane. And, of course, Congress' action in amending sections 30 and 36 confirmed the OCC's earlier interpretation.

Indeed, the Commissioner's mischaracterization obscures the real issue and presents the question backwards. The relocating bank already has its existing branches; thus, the proper question is whether there is any legal requirement to divest them when the main office relocates. The Commissioner tries to turn the question into whether there is any authority for the relocating bank to establish branches under section 36 at the existing branch locations. This presupposes that, in a main office relocation, an additional, separate grant of authority to continue existing operations at branches is needed, and in the absence of such authority, the branches must be re-evaluated as new branches under section 36. The Commissioner offers no support for the unusual proposition that when a national bank does one thing under a statutory authority, its existing other operations and powers must be affirmatively preserved in the statute or they are lost. In fact, if the Commissioner's theory were applied consistently, it would mean that in every main office relocation (including those in which the location of the branches was not an issue), all existing branches would be considered divested and the bank would have to apply to re-establish them under section 36(c). In many years of administering main office relocations under section 30, the OCC

has not required new branch applications for existing branches.[19]

Moreover, the Commissioner's assertion that the McFadden Act is the exclusive source of branch authority for national banks is simply incorrect. Before the Riegle-Neal Act, courts recognized that other statutes, in addition to the McFadden Act, can contain additional branching authority in special circumstances. See Colorado State Banking Board v. Resolution Trust Corporation, 926 F.2d at 946-47 (branching provisions of section 1823(k) for emergency thrift acquisitions separate and independent of McFadden Act); Arkansas State Bank Commissioner v. Resolution Trust Corporation, 911 F.2d at 173-74 (same); State of Texas v. National Bank of Commerce, 290 F.2d at 233 (banking offices on military facilities under section 90 independent of section 36 and state law).[20] See also 12 U.S.C. § 1823(f)(4)(B) (branches in

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[19] If the relocating bank proposes to establish a new branch at the former location of its main office, the OCC does require a separate application for that new branch. See 12 C.F.R. § 5.40(d)(4). But this requirement applies only to the new branch at the former main office location; it does not apply to retaining existing branches. The Commissioner's and IBAT's reference to section 5.40(d)(4) in connection with the retention of existing branches is mistaken.

[20] Indeed, the argument made by the Commissioner now against retaining existing branches under section 30 is similar to that made by her predecessor Texas bank commissioner in objecting to the banking facilities under section 90 in Texas v. National Bank of Commerce. There, Texas argued that section 36 was the exclusive branching authority, and in particular that section 90 was not independent of section 36, but only allowed banking facilities to be established to the extent allowed by State branching law as incorporated into section 36:

assisted interstate bank acquisitions). Before the Riegle-Neal Act, the McFadden Act did not specifically prohibit other sources of branching. This leaves open the possibility that branching may be authorized under other statutes. The OCC concluded section 30 was such an authority, but only to the extent of keeping existing branches in a main office relocation, not establishing new ones. In the Riegle-Neal Act, Congress added an exclusivity provision to the McFadden Act (new

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> The State of Texas thus bases its position on the pari materia argument that the provisions of § 90 go only so far as is permitted by § 36, i.e., that banking facilities authorized by § 90 may, under § 36, be opened only where State law permits them. The appellants and the government, on the other hand, urge that § 90 is not in any way limited to §36.

290 F.2d at 233. The Fifth Circuit rejected Texas' position and found section 90 was independent and superseded section 36 and Texas branching law. Similar to Texas then, the Texas Bank Commissioner now argues that section 30 is not independent of section 36 and does not permit a national bank to retain existing branches at locations where it could not establish them anew under section 36. The OCC believes section 30 is independent of section 36 (and remains independent until the statutory changes linking the sections on June 1, 1997). The Commissioner believes that section 30 must be construed in pari materia with section 36. Prior to the changes in the Riegle-Neal Act that settled the issue, the courts were divided on this question whether section 30 was independent or must be construed in pari materia with section 36. Compare Ramapo Bank, 425 F.2d at 344-46 (section 30 independent of section 36 and State law); McEnteer, 644 F.Supp. at 292 (same); Traverse City State Bank, 228 F.Supp. at 992 (same) with Marion National Bank, 418 F.2d at 124 (section 30 limited by section 36). By the changes adopted in the Riegle-Neal Act (new sections 30(c) and 36(e)(2)), Congress has made it clear that, after May 31, 1997, branch retention under section 30 is limited by section 36(e)(2), for the main office relocations that come within section 36(e)(2), and remains independent with respect to others.

subsection 12 U.S.C. § 36(e)(2)) that will, when it is effective, end the authority to retain branches in the state from which the main office is relocating, unless permitted under the provisions of section 36(e)(2). But until that date, the branch retention authority of section 30 continues without limitation.

In addition, the Commissioner's and the Ghiglieri court's claim that the relocation of the main office and retention of existing branches "violates the McFadden Act" relies on a conjunctive reading of sections 30 and 36 -- i.e., the belief that section 36 limits section 30. This position ignores the precedent of the Fifth Circuit in Texas v. National Bank of Commerce and the specific holdings in Ramapo Bank, Traverse City State Bank, and other cases discussed above that section 30 is independent and separate from section 36. Indeed, Ghiglieri is the only court that has followed Marion National Bank. And, subsequent to Ghiglieri, in Bank of Western Oklahoma, another district court again followed Ramapo Bank and the other cases, rejecting Marion National Bank and the supposed conjunctive reading of sections 30 and 36. See discussion at page 12 above. The position that sections 30 and 36 must be read in conjunction thus relies solely on Marion National Bank. But the reliance on Marion National Bank is especially misplaced today, after the Riegle-Neal Act. The old disagreement in the case law whether section 30 is independent or must be read in conjunction with section 36 has been settled by Congress. Section 30 and section 36 are indeed conjunctive today because Congress changed them in the Riegle-Neal Act to make it so by adding the new subsections 12 U.S.C. 30(c) and 36(e)(2), as discussed above. Congress limited branch retention under section 30 by reference to section 36 in a very specific way for certain existing branches in an interstate relocation, left other branch retention

independent, and made the new limit apply only to transactions occurring after May 31, 1997. Since Congress has acted on the question, it is no longer open for the courts to rely on Marion National Bank to read other limits from section 36 into section 30.

The Commissioner's McFadden Act argument also relies on the doctrine of "competitive equality" -- i.e., the principle that in general in section 36(c) Congress intended to insure competitive equality between state banks and national banks with respect to branches. See First National Bank in Plant City v. Dickinson, 396 U.S. 122, 133-34 (1969); First National Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252, 261 (1966). The Commissioner asserts it would violate the doctrine of competitive equality for a national bank to have a configuration of offices as a result of a main office relocation if a state bank could not have a similar configuration. The same argument was made Ramapo Bank. While Ramapo Bank did not involve the retention of existing branches, it did involve applications by a national bank that would give it a configuration of offices that a state bank could not have. The court strongly rejected the competitive equality argument in the context of section 30. Section 30 is a separate statute that by its terms and history has no reference to state law or "competitive equality" with state banks for matters within its scope. 425 F.2d at 345-46. "Competitive equality" is a consideration in construing aspects of section 36(c). Thus, it and other doctrines in branching cases are inapposite in determining the applicability of section 30. 425 F.2d at 345. In essence, the Commissioner's reliance on "competitive equality" begs the question. The question is whether section 30 or section 36 applies (i.e., does section 30 authorize the retention of branches or must they be subjected to

section 36(c)). Competitive equality is a section 36 doctrine, and its use presupposes that section 36(c), rather than section 30, is applicable. But that is precisely the point at issue.

Moreover, even as a section 36(c) matter, the so-called "competitive equality" doctrine is not all encompassing. First, as a general matter, while the McFadden Act makes national banks' branching powers generally similar to state banks, it does not make them identical. It does not simply state that national banks may branch to the same extent as state banks. It incorporates state law and makes it applicable to national banks, but it -- as a matter of federal law -- also determines what state law is incorporated and in what manner. And more generally, definitional questions under section 36 (such as "branch," "state bank" or "situated") are determined as a matter of federal law. See, e.g., First National Bank of Plant City v. Dickinson, 396 U.S. 122, 133-34 (1969) ("branch"); Department of Banking & Consumer Finance v. Clarke, 809 F.2d 266, 269-70 & n.1 (5th Cir.), cert. denied, 483 U.S. 1010 (1987) ("state bank"); Independent Bankers Association of New York v. Marine Midland Bank, 757 F.2d 453, 459 (2d Cir. 1985) ("establish and operate" and "branch"); Seattle Trust & Savings Bank v. Bank of California, N.A., 492 F.2d 48, 51 (9th Cir.), cert. denied, 419 U.S. 844 (1974) ("situated"). This complex relationship between federal law and state law in the McFadden Act sometimes means national banks have different branching powers than the state permits its state banks.

Second, in particular, the competitive equality doctrine had no bearing on interstate branches before the Riegle-Neal Act. Section 36(c) addresses and authorizes only the establishment of new branches by a national bank within the state in which it is situated, and incorporates the state's law for

branching by its own state banks. Since it addresses only branching within the state, it does not include any state law that might permit its state banks to have branches in another state, or forbid them from having branches in another state. Similarly, it does not include state laws permitting banks from other states to establish in the state, or prohibiting them from doing so. Unlike the former Douglas Amendment to the Bank Holding Company Act, the McFadden Act (before the Riegle-Neal Act) contains no trace of Congress' permitting the states to govern interstate operations. Thus, under section 36(c), the only state law relevant for a national bank is the state's branching law for branching within that state by that state's banks. Since the only state law referred to in section 36(c) is the law for in-state branching, "competitive equality" cannot be an issue for interstate branches.[21]

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[21] Indeed, in practice before the Riegle-Neal Act, there was never "competitive equality" between State banks and national banks with respect to interstate branches. States could permit State banks to have interstate branches, and State nonmember banks would be authorized to establish them. But national banks could not have taken advantage of that authority because section 36(c) permits national banks to establish new branches only within the State where the bank is situated. Before the Riegle-Neal Act, at least seven States had laws permitting interstate branching. See Interstate Banking, Banking Policy Report (volume 13, No. 3) at 12 (February 7, 1994) (survey of State laws on interstate banking and interstate branching). Here, if Texas and New Mexico had adopted such laws, State banks could have established interstate branches between those States. Thus, the McFadden Act, before the Riegle-Neal Act, did not contemplate "competitive equality" in interstate branching. While interstate branch retention under section 30 may provide an advantage to some national banks, the States also had, and continue to have until May 31, 1997, the power to grant far greater interstate branching rights to their own State banks that national banks could not easily match. After May 31, 1997, because of the Riegle-Neal Act's exclusive

Thus, careful consideration of all relevant factors reinforces the OCC's original interpretation of sections 30 and 36 before the Riegle-Neal Act. When a national bank relocates its main office, the bank is not required to divest its existing branches. The existing branches continue without re-evaluation under section 36. Section 30, including the retention of existing branches, is independent of section 36.

ii. Congressional action on sections 30 and 36 in the Riegle-Neal Act clearly shows that existing branches are retained in a main office relocation, and Congress acted to change that power for transactions after May 31, 1997.

Second, the Commissioner disagrees with the OCC's interpretation of the significance of Congress' addition of sections 30(c) and 36(e)(2) in the Riegle-Neal Act. As discussed above, the OCC's view is that these provisions quite plainly impose a new limitation on a national bank's power to keep branches in its original state under section 30 when it relocates its main office from one state to another, and make the new limitation apply to transactions occurring after May 31, 1997. With the new limitation, branches in the original state may be retained (1) if the bank could establish or acquire a branch in the original state under section 36 or other specified sections if the bank had no branches in that state, or (2) if the bank could

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interstate branching provisions for both State banks and national banks (12 U.S.C. §§ 36(e) & 1828(d)(3), discussed below), the authority to enter new States with interstate branches will be the same for national banks and State banks.

establish or acquire a branch in the original state if the branch had resulted from a Riegle-Neal interstate merger or resulted from an assisted transaction. This express limitation on branch retention following an interstate main office relocation clearly reflects Congress' understanding that national banks could generally retain their existing branches after they relocate their main office. The fact of imposing a limitation presupposes the branch retention authority pre-existed. If such branch retention were already subject to limitations based on section 36, as the Commissioner and the Ghiglieri court assert, there would be no need to enact a new subsection adding a limitation based on section 36. The imposition of the limitation makes sense only if banks had the power before and Congress now wanted to limit it to conform it to the new Riegle-Neal framework.

The Commissioner's reading of sections 30(c) and 36(e)(2) is markedly different. According to the Commissioner, before the Riegle-Neal Act, a national bank relocating its main office from one state to another can retain branches in the first state only if the branches are authorized under section 36 and state law. The Riegle-Neal Act did not change this. The provisions in sections 30(c) and 36(e)(2) merely continue that existing limitation on branch retention and add a reference to the wider range of such state-permitted branching available under the Riegle-Neal Act. According to the Commissioner, there is no branch retention authority under section 30, and the congressional action on sections 30 and 36 in the Riegle-Neal Act is not indicative of congressional intention regarding branch retention under section 30.

However, the Commissioner's interpretation of sections 30(c) and 36(e)(2) and the legislative history has the effect of making the sections mostly pointless. Under the

Commissioner's theory, before the Riegle-Neal Act, the only instances in which branches could be kept in a main office relocation are those in which the bank would be authorized to maintain the branches under the McFadden Act and state law. Then, as the Riegle-Neal Act expanded the authority for interstate branches, more interstate branches would be authorized under the McFadden Act (section 36 as amended by Riegle-Neal). For the Commissioner, there is no additional branch retention authority under section 30. But after the Riegle-Neal Act (i.e., after the June 1, 1997, date in section 36(e)(2)), the retention of branches in the narrow circumstances accepted by the Commissioner continues to be permitted, since section 36(e)(2) includes "this section" (i.e., Revised Statutes § 5155, the McFadden Act) and the Riegle-Neal Act's interstate merger provisions as continuing sources of authority. Under the Commissioner's theory of sections 30(c) and 36(e)(2), everything that was properly permitted before sections 30(c) and 36(e)(2) were added continues to be permitted after. Thus, the Commissioner's theory renders the major part of sections 30(c) and 36(e)(2) redundant. It also ignores the legislative history that the scope of branch retention under section 30 in interstate relocations will change on June 1, 1997.[22]

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[22] In this interpretation of sections 30(c) and 3[6](e)(2), the only change from prior law apparently would be the addition of a new power, after May 31, 1997, to retain branches in the original State in an interstate main office relocation if the bank could have engaged in a Riegle-Neal interstate merger under 12 U.S.C. §1831u between the two States involved. If the only change Congress was making to branch retention in interstate main office relocations was adding this new power, the statutory language used -- replete with terms and connotations of limitation -- is puzzling. In the OCC's interpretation of these sections, the reference to the Riegle-Neal Act merger provision is not the grant of a new

Moreover, the Commissioner's notion of the proper extent of permitted branch retention is inconsistent even with section 36. In the Commissioner's theory, a national bank relocating its main office from state A into state B may retain existing branches in state A only if it is permitted by section 36, which the Commissioner believes equates with being permitted by state A -- i.e., if state A permits banks from state B to establish branches in state A. But under section 36 (before the Riegle-Neal Act added section 36(g)), a national bank from state B could not establish a branch in state A under section 36(c) (unless it already had other branches there), even if state A expressly permitted it. Thus, except for grandfathered branches,[23] *the Commissioner's construction of permissible*

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branch retention power where none existed before, but the preservation of prior authority, when the new limitation begins to apply, if the specified condition of Riegle-Neal merger capability exists.

[23] Indeed, consideration of branches that are grandfathered under the McFadden Act shows that the Commissioner's theory that branch retention in a relocation is permitted only when the branches would be authorized under the McFadden Act is also internally inconsistent. The Commissioner argues that branches may be retained only when they would be permitted under the McFadden Act (which the Commissioner maintains means being permitted by State law). But, under the McFadden Act, grandfathered branches -- those in existence on February 25, 1927 -- are retained by national banks without any reference to state law. See 12 U.S.C. §§ 36(a), 36(b)(1)(B) & 36(b)(2)(B). Thus, even under the Commissioner's erroneous theory that section 36 applied to the retention of existing branches in a main office relocation, grandfathered branches could be retained solely under federal law, even if State law did not permit the branches. The treatment of grandfathered branches demonstrates that the Commissioner cannot argue both that retention of existing branches is governed by the McFadden Act and that it depends only on State law.

branch retention in an interstate main office relocation leads to a logical vicious circle: interstate branch retention is permitted when the interstate branch would be authorized by section 36(c), but section 36(c) does not authorize interstate branches.

In contrast to the Commissioner's position, the OCC's construction of sections 30(c) and 36(e)(2) -- i.e., that their purpose is to limit branch retention under section 30 and thereby change a power that national banks had before -- gives meaning and effect to the section and is a much simpler and more persuasive reading of this congressional action.

Similarly, the OCC's position is that the legislative history for these sections (quoted above at page 18) shows that Congress expected interstate relocations with branch retention to continue until June 1, 1997. In the Conference Report, Congress explicitly acknowledged the OCC's use of section 30 to approve several transactions in which a bank moved its main office from one state into another while retaining branches in the state left by the main office. The Report then says that the Riegle-Neal provision amends section 30 so that after June 1, 1997, "a national bank relocating its main office to another state may maintain branches in the first state only if those branches could have been established by a bank with its home state in the new State. See H.R. Conf. Rep. No. 651, supra at 57. This clearly endorses the branch retention under section 30 that had occurred and was expected to continue until June 1, 1997. It also explains how branch retention will change on June 1, 1997.

The Commissioner attempts to avoid this legislative history and make a claim that the legislative history should be read more narrowly by ignoring the first (and longer) paragraph

in the Conference Report and dwelling only on the second, shorter paragraph. The Commissioner asserts the language in the second paragraph referring to "appropriate State law and authority" means that the OCC is to defer to state laws that would bar relocation transactions, i.e., that Congress concurred with the retention of branches in an interstate main office relocation only when the retention of branches was in conformance with the McFadden Act and state law. In this regard, the Commissioner notes that the two OCC decisions prior to the Riegle-Neal Act involved banks that had grandfathered branches (i.e., pre-1927 branches that have special status under the McFadden Act) and then asserts that Congress' concurrence in the Conference Report is limited to such branches. However, in the two OCC decisions, branch retention under section 30 was clearly presented as the primary argument, and the argument based upon grandfathered branches was an alternative, secondary argument. See OCC First Fidelity/New Jersey Decision (Part II-B-1 (branch retention under section 30) & Part II-B-2 (grandfathered branches)); OCC NationsBank/Maryland National Decision (same). Without some express indication in the Conference Report that Congress was referring only to the secondary argument in its concurrence, we must assume Congress meant the entire analysis offered, and especially the primary argument.[24]

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[24] The Commissioner also argues that the reference in the second paragraph to the "OCC procedures in permitting relocation across State lines" and the statement that the Conferees "expect the OCC to continue to follow those procedures" mean that all subsequent applications approved must be virtual carbon copies of the first two. In particular, the Commissioner notes that the first two applications involved transactions in which, after the interstate relocation, the

Moreover, as explained in the OCC Bank Midwest Decision (at pages 58-61), we believe the language in the Conference Report referring to "appropriate state law and authority" is best understood as a reference to the manner in which the OCC's prior interstate decisions had addressed state law. In those decisions (the OCC First Fidelity/New Jersey Decision and the OCC NationsBank/Maryland National Decision), the OCC had determined that existing branches were retained in a main office relocation under section 30, without regard to section 36 and section 36's incorporation of state law. The OCC also had determined that section 30 preempted conflicting state law in this context. Then, in the subsequent applications to establish a branch at the former main office location and to merge and retain branches, we had interpreted those provisions of federal law that do incorporate aspects of state law and determined how those federal laws applied each state's law in various steps in the transactions. The OCC Bank Midwest Decision (at page 60) summarizes the positions taken by the OCC in prior decisions on the application of appropriate state law to each step of the transactions involved in the applications. On the precise issue of concern to the

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interstate relocated bank then merged with another bank in the State into which the main office had relocated. The Commissioner asserts that Sun World's proposal does not involve a subsequent merger and so does not comport with OCC's pre-Riegle-Neal procedures and so is not within the Conference Report's endorsement of the OCC's permitting interstate relocations. There is no basis for this suggestion. The critical feature of the first two transactions was the relocation application in them (which included the retention of existing branches in the original State, thus making an interstate bank). The Relocation Application here is similar.

Commissioner (whether contrary state law would bar branch retention under section 30), the two pre-Riegle-Neal decisions had set forth the OCC's view that section 30 operated independently of state law, albeit in a brief form since the issue was not squarely presented in the two cases.[25] A brief phrase in legislative history referring to the OCC's procedures in applying state law in prior applications is better understood as a reference to how the OCC actually had approached state law in the prior decisions than an indication of congressional intent to create a new doctrine that state laws were to apply to national banks in a new way in this area.

Finally, in addition to the detailed statutory and legislative history factors surveyed above, one fundamental fact overarches all considerations in determining the meaning of the congressional action in 1994. The OCC's position on sections 30 and 36 had been clearly set out in decisions in early 1994. These decisions and the OCC position were known to Congress and were a part of its deliberations in adopting the Riegle-Neal Act. If Congress had so fundamentally disagreed with the OCC's views and held views like the Commissioner's, then surely a much greater change in statutory language and clearer statements in legislative history disagreeing with the OCC would be expected.

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[25] See OCC NationsBank/Maryland National Decision (notes 43 & 44) (Maryland law); OCC First Fidelity/New Jersey Decision (note 41) (Pennsylvania law) & (note 44) (New Jersey law). See also McEnteer, 644 F.Supp. at 293-94 (section 30 preempts Pennsylvania State banking holding company law; State law also invalid under Commerce Clause); OCC Bank of New Jersey Decision (same); OCC Mark Twain Decision (section 30 preempts Kansas State bank holding company law; State law also invalid under Commerce Clause.)

iii. Congress intended existing limited interstate branching authority to continue during a transition period. The new Riegle-Neal interstate framework is not exclusive until June 1, 1997.

The Commissioner asserts that approval of Sun World's applications would violate the Riegle-Neal Act, circumventing the provisions governing interstate transactions under that Act. The Commissioner notes that in the Riegle-Neal Act Congress permitted the states to "opt-in" to or "opt-out" of the interstate merger authority created in the Act and permitted the states to determine whether to "opt-in" for de novo interstate branching. The Commissioner points to recent Texas legislation prohibiting interstate merger and branches. See note 30 below. The Commissioner apparently believes it violates the Riegle-Neal Act for Sun World to have branches in Texas through a main office relocation when Texas has adopted legislation prohibiting interstate branches. This mistaken belief stems from two sources: (1) a confusion about the exclusiveness of the Riegle-Neal framework and (2) a faulty premise that Congress empowered the states to determine whether to permit all forms of interstate branching, not only interstate branches under the two new Riegle-Neal authorities.

The Commissioner asserts that the Riegle-Neal Act is intended to be the exclusive means to branch interstate and that, if banks could use interstate main office relocations under section 30, then the authority permitted to the states to decide whether to participate in the Riegle-Neal Act's interstate branching authority would be undercut. However, the provision in the legislative history addressing the Riegle-Neal Act's exclusivity

clearly refers to the fact that the Riegle-Neal Act's authorities will be exclusive after May 31, 1997:

> The Conferees adopted provisions to assure that the comprehensive framework for interstate branching established by Title I will, when the provisions take effect, be the exclusive means for national and State banks to enter new States with interstate branches.
>
> Paragraphs (2) and (3) of section 102(b) amend the National Bank Act and the Federal Deposit Insurance Act, respectively, to state that when the interstate merger and branching provisions take effect, initial interstate entry into a host State may, with exceptions for certain emergency situations, occur only in accordance with this legislation. These provisions will assure that the conditions and safeguards which accompany initial interstate branching will apply to the establishment of interstate branching networks at the time those provisions take effect.

H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 56-57 (1994) (emphasis added). The provisions referred to are the provisions titled, "Exclusive Authority for Additional Branches," new sections 36(e) and 30(c) (for national banks) and new section 1828(d)(3) (for state nonmember banks). These are the provisions that declare that a bank may not acquire, establish, or operate a branch in a new state except under the specific provisions listed. As discussed above, section 36(e)(2) is the provision that limits a national bank's power to keep its existing branches after an interstate main office relocation. But these "exclusive authority" limitations begin to apply only on June 1, 1997. Thus, during the time until then Congress clearly did not

intend the Riegle-Neal Act's two new interstate branching authorities to be exclusive.

Underlying the Commissioner's specific arguments is the general theme that it is inherently inconsistent with the interstate branching framework created in the Riegle-Neal Act for banks to be able to have interstate branches by other methods, such as a section 30 relocation, and that therefore Congress could not have intended other methods to be permitted. As we discussed earlier, in the Riegle-Neal Act Congress authorized interstate branching by interstate merger transactions and by de novo interstate branches. Each of these authorities provides means by which the states can determine whether to participate in them or not. However, this power granted to the states applies only to the two new Riegle-Neal interstate authorities. Separately, in provisions that do not grant any additional power to the states, Congress also enacted other provisions that have the effect of making the two Riegle-Neal methods the exclusive means for national and state banks to enter new states with interstate branches. See 12 U.S.C. § § 36(e) (national banks) & 1828(d)(3) (state nonmember banks). These exclusivity provisions do not begin to limit other interstate branches until June 1, 1997. On the face of it, this clearly seems designed to provide that until then, any such other methods of interstate branching as may exist will continue in force alongside the two new Riegle-Neal methods. Then, after June 1, 1997, Congress terminates the other authorities, leaving the two Riegle-Neal Act authorities (and the other authorities listed in sections 36(e) and 1828(d)(3)) as exclusive.

It is not unreasonable for Congress to provide just such a transition period when it adopts new comprehensive legislation replacing whatever patchwork of existing practices was present

before. Here, Congress delayed the automatic federal authorization for interstate mergers for just over two and a half years until June 1, 1997. Similarly, Congress allowed other interstate branching authority (for both national banks and state banks) to continue during the same two and a half year transition period. Just as Congress did not impose interstate branching immediately upon Riegle-Neal's enactment, so also it did not make the new Riegle-Neal framework exclusive immediately upon enactment.

Moreover, it is worth remembering that state banks also enjoy the benefits of this transition period. For example, before the Riegle-Neal Act, some states had statutes allowing limited forms of interstate branching, such as allowing branching only among adjacent states or only for state savings banks or for state banks.[26] Such statutes would not qualify as opt-in statutes for Riegle-Neal Act purposes, since they are limited. But they are not rendered immediately invalid under the Riegle-Neal Act. State banks in two such states could have interstate branches

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[26] We are aware of at least two instances in which State banks used such limited State laws to form an interstate State bank. Before their Riegle-Neal implementing legislation, Connecticut, New York, and Rhode Island had such limited interstate branching statutes. In the multi-step transactions involved in the OCC Shawmut Decision (Connecticut and Rhode Island) and the OCC Chase Decision (New York and Connecticut), the applicants used an intermediate step in which an interstate State bank would be formed with State approval (in one instance with its main office in Connecticut and branches in Rhode Island, and in the other instance with its main office in New York and branches in Connecticut). The applicants used interstate State banks because national banks could not use the interstate branching authority under the State laws to form an interstate bank. Once the interstate State bank had been created, then it could convert into, or merge into, a national bank under 12 U.S.C. §§ 35, 36(b) & 215a.

under these laws. It is only on June 1, 1997, when the exclusivity provision of section 1828(d)(3) begins to limit other interstate branches, that a state bank could no longer acquire or establish an interstate branch under these limited state laws. Thus, just as the section 30 authority continues in force for national banks until June 1, 1997, so these limited state interstate branching laws continue in force for state banks until then. The OCC believes Congress intended to treat national banks and state banks consistently: the impact of the Riegle-Neal Act on limited interstate branching by national banks under section 30 is treated the same way as limited interstate branching by state banks under state law.

Indeed, these provisions bear the hallmarks of a classic legislative compromise. Some may have argued that section 30 never contained branch retention authority or that, if it did, it should end immediately upon the enactment of Riegle-Neal. Similarly, some may have argued that limited state interstate branching statutes should end immediately upon the enactment of Riegle-Neal, so that the Riegle-Neal framework would be exclusive from its inception. On the other hand, others may have argued that these other sources of interstate branching (retaining existing branches under section 30 for national banks, limited state interstate branching laws for state banks) should be allowed to continue indefinitely as a parallel authority to the Riegle-Neal framework. Congress crafted a compromise: the parallel authorities will be ended and the Riegle-Neal framework made exclusive, but only on June 1, 1997, when the Riegle-Neal framework is fully implemented.

3. **Conclusion.**

Accordingly, under section 30 a national bank may relocate its main office to any location within 30 miles, including locations across a state line. And, under section 30 and the transition provisions of the Riegle-Neal Act, after the interstate relocation of its main office, a national bank may continue to operate its existing branches in its original state. Thus, in the present Relocation Application, Sun World is legally authorized to relocate its main office from El Paso, Texas, to Santa Teresa, New Mexico, and to continue to operate its two existing branches in El Paso.

B. Sun World may Establish a New Branch at the Site of its Former Main Office in El Paso, Texas, under 12 U.S.C. § 36(c).

After its main office relocation, Sun World will be an interstate national bank. It will have its main office in Santa Teresa, New Mexico, and its existing two branches in El Paso, Texas. Sun World also has applied then to establish a new branch at the site of its former main office in El Paso, under 12 U.S.C. § 36(c). The Branch Application is a separate transaction from the main office relocation and retention of existing branches. After the relocation, if no other application were made, Sun World would have its main office in Santa Teresa and only its two existing branches in El Paso, but not an office at the former main office location in El Paso. In order to have a branch at that location, Sun World must apply to open a new branch there. Since it has continued its existing branches in El Paso in the relocation, this Branch Application is an application by an interstate national bank for an additional branch in one of the states in which it already has a branches.

This question has been considered before by the OCC and the courts. The Branch Application does not raise new issues, but only the application of established precedent for applying section 36(c) to interstate national banks.

The McFadden Act authorizes a national bank to establish new branches "at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question ... ." 12 U.S.C. § 36(c)(2). The interpretation of the statute adopted since at least 1974 has been that, for the purpose of establishing additional branches under section 36(c), an interstate national bank is "situated" in each state in which it has its main office or a branch: The bank can establish other branches within each state to the same extent as other national banks situated in that state, i.e., to the same extent that state allows its state banks to have branches within the state. See Seattle Trust & Savings Bank v. Bank of California, N.A., 492 F.2d 48 (9th Cir.), cert. denied, 419 U.S. 844 (1974). Both before and after the Riegle-Neal Act, the OCC has applied this principle from Seattle Trust in prior decisions involving national banks with operations in more than one state. See, e.g., OCC Bank Midwest Decision (Part II-B); OCC NationsBank/Maryland National Decision (Parts II-B-2 and III); OCC First Fidelity/New Jersey Decision (Parts II-B-2 and III). See also OCC Decisions listed in notes 5 and 6 above.

The Seattle Trust case involved the Bank of California, a national bank with its main office in San Francisco and branches in California. It also had grandfathered branches in Seattle, Washington, Tacoma, Washington, and Portland, Oregon. In 1970, it applied to the OCC for approval to establish a new branch in Seattle. The OCC approved the branch, concluding

that the Bank of California was situated in Washington for purposes of section 36 (c) because of its grandfathered branches and so could establish other branches in Washington as Washington law allowed Washington banks to do. The Ninth Circuit affirmed this conclusion. The court expressly held that the Bank of California was "situated" in Washington for section 36(c) purposes through its grandfathered branch. Seattle Trust, 492 F.2d at 51.

The OCC has consistently applied this interpretation of "situated" in section 36(c) -- that a bank is situated in the state(s) where it has branches as well as the state of its main office. This statutory language and interpretation continue after the Riegle-Neal Act. Existing branch authority in sections 36(a), 36(b), and 36(c) is not changed in the Riegle-Neal Act. The statutory language and legislative history clearly contemplate that existing authority under these provisions remains in effect. First, the new provision on exclusive authority for additional branches (new subsection 36(e)) is not operational until June 1, 1997. In addition, even after that date, it expressly does not apply in states in which the bank has its main office or already has a branch; and it also expressly includes, as a continuing source of authority, branching authorized "under this section" (i.e., Revised Statutes § 5155, which includes existing subsections 36(a), (b), and (c)). See Riegle-Neal Act § 102(b)(1) (adding new subsection (e) to section 36).[27]

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[27] Indeed, the section of the Riegle-Neal Act that sets out the new source of interstate branching authority in the new interstate merger transaction provides that interstate banks formed under its provisions ("section 44 interstate banks") have a similar rule covering the establishment of additional branches by section 44 interstate banks within each state in which they have existing branches. See

Moreover, another provision added to 12 U.S.C. § 36 in the Riegle-Neal Act further supports Sun World's authority to establish the branch at the former location of its main office in El Paso. Congress added section 36(f) to address the law applicable to interstate branching operations at branches in a host state of an interstate national bank. Among other provisions, section 36(f)(1)(A) provides that "the laws of the host State regarding . . . establishment of intrastate branches shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State, except -- (i) when Federal law preempts the application of such State laws to a national bank . . . ." 12 U.S.C. § 36(f)(1)(A). The provisions of section 36(f) apply to any interstate national bank (i.e., to the branches in a host state of any out-of-state national bank), without regard to the manner in which the national bank became interstate. They apply to Sun World even though it did not obtain its out-of-state branches through one of the two new interstate branching authorities adopted in the Riegle-Neal Act.

Riegle-Neal Act § 102(a) (new section 44(d)(2)). Similarly, the provisions in the Riegle-Neal Act regarding state opt-in to permit interstate branching through de novo branches apply only to the de novo establishment of a bank's first branch in another State (other than the bank's home State) "in which the bank does not maintain a branch." See Riegle-Neal Act § 103(a) (adding new subsection 36(g)). It does not apply to situations where a bank is establishing a new branch in its home State or in one of the States in which it already has a branch. In those situations, existing law under section 36(c) still applies. See Decision on the Applications of Community National Bank (OCC Corporate Decision No. 96-22, April 19, 1996) (Part II-B).

Thus, under this provision, but for the preemption exception, it is clear that, once an out-of-state national bank has branches in a host state, then the subsequent establishment of another branch within the host state is treated like the establishment of intrastate branches within the host state by the host state's state banks. Here, a Texas state bank could establish a branch at the site of Sun World's former main office in El Paso, and thus under section 36(f), Sun World would be able to do likewise. However, since there are federal laws specifically governing in-state branching by national banks (i.e., 12 U.S.C. § § 36(b), 36(c), 36(g)(2)(B), & 1831u(d)(2)), those laws would preempt this provision under the preemption exception. But, since those laws also incorporate, and make applicable to national banks, state law for in-state branching by state banks, as discussed above, the outcome is generally the same.[28] Thus, with respect to Sun World's Branch Application, under the OCC's interpretation of section 36(c), Sun World is authorized to establish the branch at the site of its former main office in El Paso under section 36(c). And, if section 36(c) does not apply in this way, then section 36(f)(1) would be applicable, and the branch authorized under section 36(f)(1).

The Texas Bank Commissioner objected to the Branch Application. The Commissioner's argument, similar to the Ghiglieri court's, appears to be that a New Mexico state bank is

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[28] In some instances, there may be a difference between the manner in which state law would apply if applied directly in section 36(f)(1)(A) and the manner in which it is incorporated in the other statutes. However, that is not the case here, and so we need not address which statutes would take precedence in such an instance.

not permitted to establish branches in Texas, because of Texas' law prohibiting out-of-state banks from establishing branches in Texas, and so a national bank in New Mexico is similarly barred from establishing branches in Texas. We agree that, if Sun World did not have its existing branches in Texas, Sun World would not have authority under section 36 to establish the new branch in El Paso. But, after the relocation, Sun World does have its existing branches in Texas. This is, in fact, merely a restatement of the Commissioner's objection to the retention of existing branches in the Relocation Application, and was addressed above. The Branch Application is a second transaction that occurs after and depends upon the first. Thus, in analyzing the legality of the Branch Application, the Relocation Application is assumed to have occurred.

Once Sun World is an interstate bank, with existing branches in Texas, the position that New Mexico state branching law is incorporated into section 36(c) with respect to branches in Texas, or that Texas law prohibiting "out-of-state" banks from establishing branches in Texas, is incorporated into section 36(c) for additional branches in Texas is clearly erroneous. The fact that Texas has enacted legislation purporting to "opt-out" of the interstate branching authorities in the Riegle[-]Neal Act relates only the power to have branches under 12 U.S.C. § § 36(d), 36(g) & 1831u. It has no bearing on sections 36(c) or 36(f). When an interstate national bank is applying to establish an additional branch in one of the states in which it already has branches (a host state), the law is clear that the applicable state branching law incorporated into federal law for the national bank is the host state's statute for the establishment of in-state branches by the host state's own state banks. Seattle Trust established this construction of section 36(c) for interstate

national banks. Section 36(f) leads to the same result if section 36(c) is not so applied. The Riegle-Neal Act has the same rule for additional branches in a state by interstate national banks formed under the new interstate provisions of the Riegle-Neal Act. See 12 U.S.C. § § 36(g)(2)(B) & 1831u(d)(2).[29]

Therefore, after the main office relocation, Sun World continues to be situated in Texas (as well as New Mexico) for section 36(c) purposes by virtue of its existing branches there. And thus, as a matter of federal law under section 36, it can establish additional branches in Texas to the same extent that national banks whose main office is in Texas may establish branches. Under Texas statute, a Texas state-chartered bank is permitted to "establish and maintain branches at any location" without geographic limit. See Tex. Rev. Civ. Stat. Ann. art. 342-3.201(a) & 342-3.203 (West Supp. 1996). A Texas state bank could establish a new branch at the former location of Sun World's main office in El Paso. Thus, a national bank situated in Texas could establish a new branch at that location under 12 U.S.C. § 36(c). Therefore, Sun World may establish a new branch at that location under section 36(c).

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[29] The Ghiglieri court's analysis of the branch application in that case was similarly flawed. Once the court determined that the bank's existing branches in Arkansas could not be retained under section 30, there was no need to address the establishment of the new branch at the old main office site, since the legal authority for the new branch under section 36(c) depended upon the bank's being situated in Arkansas because of its existing branches. If there are not existing branches in Arkansas, then the court's additional discussion that both Texas and Arkansas law apply through section 36(c) to the bank's authority to establish an additional branch in Arkansas, as well as the court's manner of applying Arkansas law, are clearly contrary to the federal statutes, as set out in the text above.

C. State Laws that Conflict with Federal Law Conferring this Authority on National Banks Cannot be Applied to Prevent or Restrict these Applications.

As we have seen, the transactions proposed by Sun World in these Applications are authorized under federal law, specifically 12 U.S.C. § § 30 and 36(c). The Texas Bank Commissioner, the New Mexico Bank Commissioner, and IBAT objected to them, asserting the transactions would violate both federal and state law. The federal law issues were discussed above in Sections A and B. With respect to the state law objection, the only provisions cited that it is alleged the Applications would violate are provisions of Texas law. The Texas Commissioner asserts that Texas law specifically prohibits interstate branching and cites recent legislation.[30] The

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[30] The Commissioner cites Article 489f which is in effect from August 28, 1995 until September 2, 1999, and provides as follows:

> Sec. 2. Notwithstanding any other law:
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> (1) pursuant to Section 44(a)(2), Federal Deposit Insurance Act (12 U.S.C. Section 1831u(a)(2)), a domestic bank may not engage in a merger transaction involving an out-of-State bank;
>
> (2) an out-of-State bank may not establish a de novo branch in this State or acquire a branch in this State by purchase or other means;
>
> (3) a domestic bank may not establish a de novo branch in a State other than this State or acquire a branch in a State other than this State by purchase or other means.

Commissioner also maintains a national bank may not engage in branch banking if state banks cannot have the same branches, and notes again the Texas prohibition. The Commissioner appears to believe that, if state banks are not specifically authorized to have interstate branches between New Mexico and Texas (and indeed are prohibited), then national banks also may not do so, whether directly or by retaining branches in a main office relocation. In other words, the Commissioner's view is that a national bank in Sun World's position can have branches in Texas only in accordance with express state law, and that the absence of such express New Mexico and Texas authority for interstate branches by state banks, and especially in view of

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Tex. Rev. Civ. Stat. Ann. art 489f (West Supp. 1996). In addition, IBAT refers to a provision of the Texas Constitution (Art. XVI, Sec. 16) that IBAT states has been interpreted by the Texas Attorney General to mean that foreign corporations are not permitted to exercise banking privileges in Texas. IBAT does not identify the specific portion of Art. XVI, Sec. 16 or the Texas Attorney-General opinion. We assume IBAT is referring to the following paragraph from the Texas Constitution:

> No foreign corporation, other than the national banks of the United States domiciled in this State, shall be permitted to exercise banking or discounting privileges in this State.

Texas Constitution Art. XVI, Sec. 16(a) (third paragraph). It is not clear this provision would necessarily bar Sun World's proposal. In particular, it is not clear how the provision would be intended to apply to an out-of-State national bank that lawfully operated branches in Texas under federal law, especially in light of 12 U.S.C. § 36(f). If this provision of the Texas Constitution is construed to bar out-of-State national banks from operating branches in Texas, then, with respect to Sun World's applications, it is subject to the same analysis as the Texas statute cited by the Commissioner and discussed in this section.

Texas' prohibition, means that Sun World's branches are unlawful.

However, this is incorrect as a matter of law for several reasons. First, the authority of Sun World to have branches in Texas is determined by federal law, not state law. Even though some parts of the applicable federal law incorporate state law, the authority of national banks to have branches is a matter of federal law, and a national bank's branch is unauthorized only if it is impermissible under federal law. The Commissioner's objections under the applicable federal law were addressed above. Under federal law, Sun World may retain its two existing branches in El Paso in its main office relocation under the authority of 12 U.S.C.§ 30, and state law is not a factor under section 30 at all. See, e.g., Ramapo Bank, 425 F.2d at 344; McEnteer, 644 F.Supp. at 292-93; OCC Bank Midwest Decision (Parts II-A, II-D, III). And so the existing branches in El Paso are retained without reference to either New Mexico or Texas law. This interpretation of sections 30 and 36 was expressly approved by Congress in the Riegle-Neal Act. Then, also under federal law, Sun World may establish a new branch at the former location of its main office in El Paso (and other additional new branches in New Mexico or Texas) under 12 U.S.C. § 36(c). While state law is a factor under section 36(c), it is federal law that determines which aspects of state law are so incorporated, and in what manner they are incorporated. Here, the state law incorporated for the establishment of additional branches within Texas is the law for branching within Texas by Texas state banks because Sun World is situated in Texas for section 36 purposes. See, e.g., Seattle Trust, 492 F.2d at 51;

Part II-B above.[31] Thus, the fact that Texas law does not permit New Mexico state banks to establish branches in Texas, or that New Mexico law may not permit New Mexico state banks to establish branches in Texas, is immaterial to Sun World's authority to establish the new branch in El Paso under section 36(c). Congress adopted a similar state-by-state framework for an interstate national bank's establishment of additional branches within each state in the Riegle-Neal Act. See 12 U.S.C. § § 36(f)(1), 36(g)(2)(B) & 1831u(d)(2) (discussed above at note 27).

Moreover, the Commissioner's characterization of this matter as a "violation of state law" reveals that she has confounded two quite distinct questions. First, there is the issue of what state laws are incorporated into the McFadden Act and so are made applicable to national banks. This is a matter of federal law. Once it is determined what state laws are incorporated and the manner in which they are incorporated, then if a proposed transaction by a national bank would not be

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[31] In general, for purposes of section 36(b) and section 36(c) of the McFadden Act, the State law that is incorporated is State law dealing with branching by that State's banks within the State. State laws pertaining to the activities of the State's banks outside the State or to the activities of out-of-State banks within the State are not within the scope of what the McFadden Act refers to. See, e.g., OCC PNC/Kentucky Decision (at page 12, note 10); OCC Bank Midwest Decision (Parts II-B, II-C-2, II-D, III-B-1-b). Thus, any provisions of New Mexico or Texas law that permit or do not permit State banks to have branches in other States, that authorize out-of-State banks to have branches within the State, or that prohibit out-of-State banks from operating branches in the State are not the State laws incorporated in sections 36(b) and 36(c). Such laws are relevant for the 12 U.S.C. §§ 36(g) & 1831u.

permitted under the McFadden Act (incorporating the state law), then it might be said the transaction "violates state law" in that indirect sense, although strictly speaking it is the federal law that is being violated. In these Applications, the OCC has determined that the transactions do not violate federal law, including the applicable state law incorporated in the McFadden Act. Second, there is the issue of whether a state law that purports to apply to a national bank by operation of the state law itself is being violated, including determining whether the state law applies or not. In this regard, once it has been determined what the applicable federal law is (including those parts of state law incorporated into federal law), then the question whether other remaining provisions of state law conflict with the applicable federal law is a matter for standard preemption considerations.[32]

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[32] Like the Commissioner, the Ghiglieri court similarly confounded these distinct issues in declaring that, since the McFadden Act incorporates State law, there can be no conflict between State and federal law with respect to that section. Since the manner in which federal incorporates State law into the McFadden Act to apply to national banks can be different from the manner in which the State law applies directly to State banks, there can be conflict, thus giving rise to preemption. For example, in a series of cases, the courts have determined that a "state bank" for McFadden Act purposes includes State savings and loan associations, as well as State commercial banks, and therefore State branching law for branching by those types of institutions was incorporated into section 36 for branching by national banks, even if it permitted greater branching than the State permitted for its State commercial banks. See, e.g., Independent Bankers Ass'n of America v. Clark, 917 F.2d 1126 (8th Cir. 1990); Department of Banking & Consumer Finance v. Clarke, 809 F.2d 266 (5th Cir.), cert. denied, 483 U.S. 1010 (1987). Thus, in those States, State laws applying the State's branching laws for State commercial banks to national banks would conflict with the federal branching authority of the McFadden Act.

In Sections A and B above, we determined that federal law, including the appropriately incorporated state law, authorizes the proposed transactions in these Applications. We now consider the impact of other state law -- the Texas laws raised by the Commissioner and IBAT -- on the Applications. First, contrary to the Commissioner's assertion, it is not clear the Texas statute, if read strictly and literally, would prohibit Sun World's proposed transactions. The Texas statute prohibits a merger between a Texas bank and an out-of-state bank. There is no merger here. The Texas statute declares that an out-of-state bank may not establish a de novo branch in Texas or acquire a branch. Sun World's retention of its existing two branches in El Paso is not the establishment or acquisition of a branch. Sun World's establishment of the new branch at the former location of its main office in El Paso is not the establishment of a de novo branch within the meaning of interstate branching statutes because it is an additional branch in a state in which the bank already has a branch.[33] Thus, Sun

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[33] The Texas interstate branching statute does not define "de novo branch." But since the Texas statute was adopted in response to the Riegle-Neal Act, it is reasonable to assume that similar terms in the Texas statute are intended to incorporate the same concept of de novo branching by an out-of-State bank as it is used in the Riegle-Neal Act -- i.e., the initial establishment of a new branch only in a State in which the bank does not already have a branch. See 12 U.S.C. § 36(g)(1) (introductory clause). Even if "de novo branch" is expanded to include even additional branches, then only the Branch Application, not the Relocation Application (including the retention of existing branches), would violate the Texas statute.

World's proposed transactions do not appear to come within the scope of the Texas statute.

Second, if the Texas statute is interpreted in the way the Commissioner seems to believe and is construed as intending to ban an out-of-state bank from maintaining branches in Texas in any manner whatsoever, then the effect would be to prevent Sun World from keeping its existing branches in El Paso and from establishing the additional branch at the former main office location in El Paso. Thus, the Texas laws would conflict with the authority granted to national banks under federal law in 12 U.S.C. § § 30 and 36. Since it would directly conflict with federal law, it would be preempted under the Supremacy Clause. See, e.g., Fidelity Federal Savings & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982); Franklin National Bank v. New York, 347 U.S. 373, 378-79 (1954). Indeed, the courts have previously ruled that section 30 preempts contrary state laws. See, e.g., Ramapo Bank, 425 F.2d at 344; McEnteer, 644 F.Supp. at 292-94. See also OCC Bank Midwest Decision (Parts II-A, II-D, and III-A) (discussion of section 30 and of preemption generally). The Supreme Court recently reiterated the status of national banks as creatures of the federal government and the impact that has on determining when state laws that prohibit or hinder a national bank from exercising the powers granted under federal law are preempted. See Barnett Bank of Marion County, N.A. v. Nelson, No. 94-1837, slip op. at 6-8, 517 U.S. ___, 134 L.Ed.2d 237, 245-46 (March 26, 1996). Accordingly, the Texas law would be preempted and could not apply to prohibit, restrict, limit, or condition Sun World's main office relocation, the continuation of its existing

branches in El Paso, and the establishment of the additional branch in El Paso.[34]

The Commissioner might argue that the Texas statute is immune to preemption because it was enacted pursuant to congressional authorization in the Riegle-Neal Act. In the Act, Congress permitted the states to determine whether to opt-out of, or to opt-in early for, Riegle-Neal mergers and permitted the states to determine whether to opt-in at all for Riegle-Neal de novo interstate branching. See 12 U.S.C. § 1831u(a)(3) (early mergers) & 36(g) (de novo branches). This Texas statute purportedly was enacted for that purpose. However, that congressional authorization extends only to deciding whether or not to participate in the two new federal interstate branching authorities created in the Riegle-Neal Act. Congress addressed the continuation of existing authority under sections 30 and 36 in a separate provision of the Riegle-Neal Act (new 12 U.S.C. § § 30(c) & 36(e)) that does not depend on either of the new

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[34] In reviewing the preemption issues in this corporate application, we have not used the notice and comment procedures added in the Riegle-Neal Act for preemption determinations involving State laws in the areas of community reinvestment, consumer protection, fair lending, and establishment of intrastate branches. See Riegle-Neal Act § 114 (adding new Revised Statutes § 5244). First, we include the preemption analysis here only because the Texas Commissioner asserts the transactions violate State law, even though the State law could be interpreted to avoid conflict. Second, even if the Texas statute did cover these transactions and even if it were within one of the four areas, court cases and prior OCC decisions have previously addressed the preemptive effect of federal law on statutes such as these. Thus, this matter would qualify for the exception in section 5244(c)(1)(A). Finally, it is not clear that the new procedure in the Riegle-Neal Act covers matters that do not arise in an opinion letter or interpretive rule, but in a corporate application decision in a process that has its own public notice and comment requirement.

authorities and does not include any grant of authority to the states to determine whether interstate branches under other, existing statutes may occur. Congress decided to leave the limited existing authority in effect, and, unlike the new Riegle-Neal authorities, did not give the states the power to opt-out of it.

Similarly, if applied here in a non-Riegle-Neal transaction, the Texas law would violate the Commerce Clause because it would impose an impermissible burden on interstate commerce since it bars out-of-state businesses from entry into Texas and does so without congressional authorization. The Commerce Clause limits the power of the states to erect barriers against interstate trade. See, e.g., Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 35 (1980). The Texas statute would not be authorized under any federal law that would shelter it from Commerce Clause scrutiny. See OCC Bank Midwest Decision (Part III-B-1). In particular, it would not be authorized by the Riegle-Neal Act, since the authority Congress conferred on the states in that Act is limited to the interstate branching authorities created in the Act, and Congress itself left other interstate authorities in place until June 1, 1997. Since the state statute is plainly and exclusively directed against institutions from other states, it is subject to strict scrutiny under a virtual per se test, and would be invalid under well-established Commerce Clause principles. See, e.g., BT Investment Managers, 447 U.S. at 36; Philadelphia v. New Jersey, 437 U.S. 617, 624, 626-27 (1978). Moreover, even if the more flexible test used in some circumstances were applicable here, see Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), the state statute would violate the Commerce Clause both because it does not serve constitutionally legitimate local interests and because

they impose more than an incidental burden on interstate commerce. See BT Investment Managers, 447 U.S. at 42-44; OCC Bank Midwest Decision (Part III-B-2) (Commerce Clause analysis of Kansas statute prohibiting out-of-state banks from having branches in Kansas). Therefore, if the Texas statute were construed as the Commissioner believes and purported to bar Sun World from having branches in El Paso, it would violate the Commerce Clause and could not be applied to interfere with Sun World's proposed transactions here.

D. Conclusion

In conclusion, our legal analysis of these Applications follows our analysis of prior interstate main office relocation decisions and other prior decisions involving interstate national banks. The relocation of Sun World's main office from El Paso, Texas, to Santa Teresa, New Mexico, is authorized under 12 U.S.C. § 30. Sun World may continue to operate its two existing branches in El Paso under section 30. Sun World may also establish a new branch at the former location of its main office in El Paso under 12 U.S.C. § 36(c). The Riegle-Neal Act re-affirmed the federal authority for these transactions. State laws that would prohibit or limit the exercise of these federally granted powers are preempted. Accordingly, these Applications are legally authorized.

III. ADDITIONAL STATUTORY AND POLICY REVIEWS

The Community Reinvestment Act ("CRA") requires the OCC to take into account the applicant's record of helping to

meet the credit needs of its entire community, including low- and moderate-income neighborhoods, when evaluating certain applications. See 12 U.S.C. § 2903. Sun World converted from a federal savings bank to a national bank on January 31, 1996. At that time it had an outstanding rating with respect to CRA performance assigned by the Office of Thrift Supervision. No public comments were received by the OCC relating to these Applications that would cause the OCC to question the bank's performance in complying with the CRA. In addition, all other national bank subsidiaries of NationsBank Corporation are rated outstanding or satisfactory with respect to CRA performance.

The relocation and operation of interstate branches should have no adverse effect on the bank's CRA performance. The bank will continue the same CRA statement, policies, programs, and personnel that it has today. The relocation and operation of interstate branches do not alter the bank's obligation to help meet the credit needs of its community in the El Paso area on both sides of the state line.

IV. CONCLUSION AND APPROVAL

For the reasons set forth above, the Relocation Application and the Branch Application are legally authorized under 12 U.S.C. § § 30 and 36. The transactions also meet the criteria for approval under other statutory factors. Accordingly, these Applications are hereby approved.

_____ _____

Julie L. Williams Date
Chief Counsel

Application Control Numbers:
96-ML-07-0013 & 96-ML-05-0130

Comptroller of the Currency
Administrator of National Banks

Washington. D.C. 20219

DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATIONS OF COMMERCIAL NATIONAL BANK OF TEXARKANA, TEXARKANA, ARKANSAS

March 8, 1995

I. INTRODUCTION

On December 5, 1994, Commercial National Bank of Texarkana, Texarkana, Arkansas ("CNB") filed an application with the Office of the Comptroller of the Currency ("OCC") for approval to change the location of its main office from Texarkana, Arkansas, to Texarkana, Texas, under 12 U.S.C. § 30 ("the Relocation Application"). The location in Texarkana, Texas, is less than two miles from the city limits of Texarkana, Arkansas. After the relocation of its main office, the Bank will continue to operate its existing branches in Arkansas. On December 5, 1994, CNB also applied for approval to establish a branch at the former location of its main office in Texarkana, Arkansas, under 12 U.S.C. § 36(c) ("the Branch Application").

As of December 31, 1994, CNB had approximately $92 million in assets and $82 million in deposits and operated three branch offices in Arkansas, two in Texarkana and one in Fouke, and one stand-alone customer-bank communication terminal branch (i.e., an automated teller machine) in a grocery store in Texarkana. All of these are in Miller County, Arkansas. CNB is a subsidiary of Commercial Bracshares, Inc., a one bank holding company ("Commercial Bancshares"). Through the main office relocation,

CNB will be able to have banking offices in both the Texas and the Arkansas portions of Texarkana.

By letter dated January 13, 1995, and received by the OCC on January 18, 1995, the Arkansas State Bank Commissioner objected to the Applications. The Arkansas Commissioner asserted the Applications would be in contravention of Arkansas law because, after the relocation into Texas, CNB would be a bank domiciled in Texas and Arkansas does not provide for or permit interstate branching. The Commissioner also claimed that approval of the Applications would be inconsistent with the Riegle-Neal Act. The Riegle-Neal Act is discussed in Part II-C, and the Commissioner's objections are discussed in Part II-D.

By letter dated January 18, 1995, and received by the OCC on January 23, 1995, the Texas State Bank Commissioner also objected to the Applications. The Texas Commissioner asserted the Applications would be contrary to Texas law in two respects. First. the Texas Commissioner states that Texas does not permit its banks to have branches in another state, and so CNB's maintenance of branches in Arkansas, after it has relocated its main office into Texas, would be contrary to applicable branching law. Second, the Texas Commissioner alleges that Commercial Bancshares would be in violation of Texas' bank holding company provisions that allow an out-of-state bank holding company to acquire a bank in Texas only if it has been in existence for five years. In addition, just as the Arkansas Commissioner, the Texas Commissioner also claimed that approval of the Applications would be inconsistent with the Riegle-Neal Act. The Riegle-Neal Act is discussed in Part II-C, and the Commissioner's objections are discussed in Part II-D.

II. LEGAL AUTHORITY

The OCC has considered transactions involving interstate main office relocations, interstate mergers, and interstate branching in a number of prior applications. Before the passage of the Riegle-Neal Act, the OCC had authorized the relocation of a national

bank's main office to another location across a state line in several decisions. In two of those decisions, the bank -- like CNB in the present application -- would also continue to operate its existing branches in its original state. See Decision of the Office of the Comptroller of the Currency on the Applications of American Security Bank, N.A. Washington, D.C., and Maryland National Bank, Baltimore, Maryland (OCC Corporate Decision No. 94-05, February 4, 1994), reprinted in [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,695 ("OCC NationsBank/Maryland National Decision"); Decision of the Office of the Comptroller of the Currency on the Applications of First Fidelity Bank, N.A., Pennsylvania, Philadelphia, Pennsylvania, and First Fidelity Bank, N.A., New Jersey, Newark, New Jersey (OCC Corporate Decision No. 94-04, January 10, 1994), reprinted in [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,644 ("OCC First Fidelity/New Jersey Decision"). Other decisions involved only the interstate relocation of the main office.[1] In addition, there were a

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[1]See, e.g., Decision on the Applications of the First National Bank of Polk County (OCC Corporate Decision No. 94-21, April 28, 1994) (relocation from Tennessee into Georgia). The OCC also approved national bank main office relocations under section 30 from Missouri into Kansas, from New Jersey into Pennsylvania, from Alabama into Georgia, and from Washington into Idaho. See Decision on the Application of Mark Twain Bank, N.A. Independence, Missouri, to Relocate its Main Office to Overland Park, Kansas (1985), reprinted in [1984-85 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 86,180; Decision on the Application of the Bank of New Jersey, N.A., Moorestown, New Jersey, to Relocate its Main Office to Philadelphia, Pennsylvania (1986); Decision on the Application of South Trust National Bank, Phoenix City, Alabama, to Relocate its Main Office to Columbus, Georgia (1989); Decision on the Application of the First National Bank of Spokane, Spokane, Washington, to Relocate its Main Office to Coeur D'Alene, Idaho (1991). The OCC also has approved interstate relocations in which the relocating bank immediately merged with an affiliated bank in the other state and went out of existence as a separate entity. See Relocation of Midlantic National Bank/Delaware, Wilmington, Delaware, to Carneys Point, New Jersey, and Merger with Midlantic National Bank, Newark, New Jersey (1990); Relocation of Central Atlantic National Bank from Newark, Delaware, to Aberdeen, Md, and Merger with Maryland National Bank, Baltimore, Md (1991).

number of other applications involving other types of interstate merger and branching transactions.[2]

Moreover, in recent months since passage of the Riegle-Neal Act, see Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (enacted September 29, 1994), the OCC has approved additional interstate applications.[3] In those applications we considered the

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[2]See Decision on the Application to Merge Girard Bank, Bala Cynwyd, Pennsylvania, into Heritage Bank N.A., Jamesburg, New jersey, with the Title of Mellon Bank (East) N.A. (March 27, 1984), reprinted in [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 99,925 ("OCC Mellon Decision") (in 1984 Heritage had a grandfathered branch in Philadelphia; the 1984 transaction was not consummated and Heritage later became part of Midlantic National Bank); Decision on the Application of State Savings Bank, Southington, Connecticut, to Convert into a National Banking Association, State Savings Bank, N.A., and Merge into Connecticut National Bank, Hartford, Connecticut (OCC Merger Decision No. 91-07, April 8, 1991), available in 1991 OCC Ltr. LEXIS 73 ("OCC Shawmut Decision") (both banks owned by Shawmut National Corporation; at the time of conversion State Savings Bank had branches in Rhode Island); Decision on the Application for the Merger of First Peoples National Bank, Kingston, Pennsylvania, with and into First Fidelity Bank, N.A., Salem, New Jersey (OCC Corporate Decision No. 94-07, February 23, 1994) ("OCC First Peoples Decision"); Decision on the Applications to Merge NationsBank of D.C., N.A., Maryland National Bank, and NationsBank of Maryland, N.A. (OCC Corporate Decision No. 94-22, April 29, 1994) ("OCC NationsBank/D.C.-Maryland Decision"); Decision on the Application for the Merger of Continental Bank, Norristown, Pennsylvania, into Midlantic National Bank, Newark, New Jersey (OCC Corporate Decision No. 94-37, August 12, 1994) ("OCC Midlantic Decision").

[3]See, e.g. Decision on the Applications of Capital Bank, N.A., Washington, D.C. (OCC Corporate Decision No. 94-45, October 13, 1994); Decision on the Applications of First Fidelity Bank, N.A., New York and First Fidelity Bank, N.A. (OCC Corporate Decision No. 94-42, October 20, 1994) ("OCC First Fidelity/New York Decision"); Decision on the Applications of National Westminster Bank USA and National Westminster Bank NJ (OCC Corporate Decision No. 94-43, October 20, 1994) ("OCC NatWest Decision"); Decision on

impact of the new interstate branching legislation on national banks' authority under existing law. In particular, in one decision, a State bank commissioner objected to the transaction, arguing that the maintenance of interstate branches in the state would violate a state law and also raising interpretive questions under the Riegle-Neal Act. See Decision of the Office of the Comptroller of the Currency on the Applications of Bank Midwest of Kansas, N.A., and Bank Midwest, N.A. (OCC Corporate Decision No. 95-05, February 16, 1995) ("OCC Bank Midwest Decision"). In that decision, because of the important issues raised by the objection, we revisited our analysis of existing law and thoroughly considered the impact of the Riegle-Neal Act on existing authority and the applicability of state law.

So, these Applications are similar to a number of prior interstate relocation, merger, and branching applications approved by the OCC and do not raise new legal issues. The legal analysis and authorities are set forth in the prior decisions, and only a summary will be presented here. The earlier decisions should be consulted for the full analysis. In particular, because of the state commissioners' objections in this case, the analysis of similar state law issues and the Riegle-Neal Act in the OCC Bank Midwest Decision should be consulted. Accordingly, these Applications are legally authorized.

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the Applications of UMB First National Bank and United Missouri Bank of St. Louis, N.A. (OCC Corporate Decision No. 94-44, October 31, 1994) ("OCC United Missouri Decision"); Decision on the Applications of First Fidelity Bank, N.A., and The Bank of Baltimore (OCC Corporate Decision No. 94-47, November 4, 1994); Decision on the Applications of Sequoia National Bank and Sequoia National Bank, Maryland (OCC Corporate Decision No. 94-46, November 30, 1994); Decision on the Applications of NationsBank of South Carolina, N.A., and NationsBank of North Carolina, N.A. (OCC Corporate Decision No. 95-06, December, 1994) ("OCC NationsBank/Carolinas Decision"); Decision on the Applications of CoreStates Bank, N.A., and New Jersey National Bank (OCC Corporate Decision No. 95-04, February 6. 1995).

A. The Relocation of a National Bank's Main Office Across State Lines and Continued Operation of Branches in its Original State are Authorized under 12 U.S.C. § 30.

1. The Relocation of CNB's Main Office from Texarkana, Arkansas, to Texarkana, Texas, is Authorized under 12 U.S.C. Section 30.

In the Relocation Application, CNB applied to change the location of its main office from Texarkana, Arkansas, to Texarkana, Texas, a distance of less than two miles. CNB will continue to operate its existing branches in Arkansas. After the relocation, CNB will be an interstate national bank, with its main office in Texas and branches in Arkansas.

The relocation of CNB's main office from Texarkana, Arkansas, to Texarkana, Texas, is legally authorized under 12 U.S.C. § 30. Section 30 authorizes a national bank to change the location of its main office to any location within 30 miles of the limits of the city in which its main office is located. 12 U.S.C. § 30(b). Such a relocation, even across state lines, is authorized by the literal language of the statute, and nothing in the legislative history gives any reason not to adhere to the literal language. The authority to relocate a main office is not limited by the McFadden Act, 12 U.S.C. § 36. See, e.g., Ramapo Bank v. Camp, 425 F.2d 333, 340-46 (3d Cir.), cert. denied, 400 U.S. 828 (1970); Traverse City State Bank v. Empire National Bank, 228 F.Supp. 984, 992 (W.D. Mich. 1964). The Bank Holding Company Act also does not apply to main office relocations. See Synovus Financial Corporation v. Board of Governors of the Federal Reserve System, 952 F.2d 426, 434-37 (D.C. Cir. 1991); McEnteer v. Clarke, 644 F.Supp. 290, 292-93 (E.D. Pa. 1986). See also State of Idaho Department of Finance v. Clarke, 994 F.2d 1441, 144749 (9th Cir. 1993); Federal Reserve Board, Rescission of Policy Statement Requiring Application for Relocation of a Subsidiary Bank to Another State, 57 Fed. Reg. 9973 (March 23, 1992) (rescinding former 12 C.F.R. § 225.144). Finally, section 30 preempts state

laws that conflict with the authority it confers on national banks. See, e.g., Ramapo Bank; McEnteer; Traverse City State Bank. Thus, the literal language of section 30 must be given full effect. National banks are authorized to move their main office to any location within 30 miles, even across state lines. See OCC Bank Midwest Decision (Part II-A-1); OCC NationsBank/Maryland National Decision (Part II-A); OCC First Fidelity/New Jersey Decision (Part II-A).

2. CNB's Continued Operation of its Existing Branches in Arkansas is Authorized.

When it relocates its main office to Texarkana, Texas, CNB will continue to operate its existing branches in Arkansas. In three of the OCC's earlier decisions involving the relocation of a national bank's main office across a state line and the continuation of existing branches in the original state, we extensively analyzed the legal authority for the continued operation of existing branches and concluded that continued operation of such existing branches is legally authorized. When a national bank relocates its main office under section 30, it may continue to operate its existing branches as an implied, but necessary, adjunct to the express authority to move the main office. The statutory language of sections 30 and 36 does not expressly address this area. The OCC concluded that this was Congress' intent by examining the overall statutory framework and its historical development. Congress enacted section 30, allowing the main office to relocate, without requiring the divestiture, re-examination, or re-authorization of existing branches. Congress subsequently amended sections 30 and 36 numerous times without indicating any intent to subject the existing branches of a relocating bank to section 36. During this development, OCC and court decisions had opined that sections 30 and 36 operated independently. In the absence of express congressional action requiring that existing lawfully established branches be re-subjected to a de novo analysis under section 36 and divested, we concluded that the intention of the statutory scheme, considered as a whole, was that existing branches were continued.

See OCC Bank Midwest Decision (Part II-A-2); OCC NationsBank/Maryland National Decision (Part II-B-1); OCC First Fidelity/New Jersey Decision (Part II-B-1).

Moreover, in the Riegle-Neal Act, Congress made this understanding explicit in its amendments of sections 30 and 36. In the language of section 30, as it now reads, it is clear that national banks keep their existing branches when they relocate their main offices. In the Act, Congress placed a new limitation on a relocating national bank's authority to keep branches in the State of its former main office. Henceforward, from June 1, 1997, a relocating national bank will be able to keep such branches only in accordance with the branching rules in new section 36(e)(2). See Riegle-Neal Act §§ 102(b)(2) (adding new subsection (c) to section 30) & 102(b)(1)(B) (adding new subsection (e)(2) to section 36). The legislative history reiterates the statutory language. See H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 57 (August 2, 1994). The Riegle-Neal Act and the Conference Report are also discussed in Part II-C below. From the amended statutory language and its legislative history, it is clear Congress understood that under existing law a national bank can move its main office across state lines while keeping branches in its former state and that this existing law is being changed and limited only by the express congressional action in the amendments. See OCC Bank Midwest Decision (Part II-A-2e) (further analysis of this aspect of Riegle-Neal Act).

Accordingly, after the relocation of its main office to Texarkana, Texas, CNB's continued operation of its existing branches in Arkansas is legally authorized.

B. After the Relocation, CNB may Establish a Branch at the Site of its Former Main Office in Texarkana, Arkansas, under 12 U.S.C. § 36(c).

After the relocation, CNB will be an interstate national bank, with its main office in Texarkana, Texas, and branches in

Texarkana, Arkansas. In the Branch Application, CNB has applied to establish a branch at the site of its former main office in Texarkana, Arkansas, under 12 U.S.C. § 36(c). This Branch Application thus involves an application by an interstate national bank for an additional branch in one of the states in which it already has branches. The OCC has previously considered section 36(c) in the context of branches by interstate banks. Applying the same analysis to this Branch Application, we find that the proposed branch is legally authorized under 12 U.S.C. § 36(c).

> The McFadden Act authorizes a national bank to establish new branches
>
> at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question ....

12 U.S.C. § 36(c)(2). The issue, then, is the interpretation of the phrase "the State in which said association is situated" as applied to national banks that have offices in more than one State. In particular, the issue is whether, after the main office relocation, CNB is "situated" in Arkansas by virtue of its existing branches there.

This question has been considered before by the OCC and the courts. The interpretation of the statute adopted since at least 1974 has been that, for the purpose of establishing additional branches under section 36(c), an interstate national bank is "situated" in each state in which it has its main office or a branch: The bank can establish other branches in each state to the same extent that state allows its state banks to have branches. See Seattle Trust & Savings Bank v. Bank of California. N.A., 492 F.2d 48 (9th Cir. 1974), cert. denied, 419 U.S. 844 (1974). The OCC has applied this principle from Seattle Trust in prior decisions involving national banks with operations in more than one state. See OCC Bank Midwest Decision (Part II-B); OCC

NationsBank/Maryland National Decision (Parts II-B-2 and III); OCC First Fidelity/New Jersey Decision (Parts II-B-2 and III). See also OCC decisions listed in notes 2 and 3 above.

This issue was fully addressed in the Seattle Trust case involving the Bank of California. The Bank of California is a national bank with its main office in San Francisco and branches in California. It also has grandfathered branches in Seattle, Washington, Tacoma, Washington, and Portland, Oregon. In 1970 it applied to the OCC for approval to establish a new branch in Seattle. The OCC approved the branch, concluding that the Bank of California was situated in Washington for purposes of section 36(c) because of its grandfathered branches and so could establish other branches in Washington as Washington law allowed Washington banks to do.

The Ninth Circuit affirmed this conclusion. The legislative history contained nothing that illuminated congressional intent on the meaning of "situated" in section 36(c). See Seattle Trust, 452 F.2d at 51. As a guide to interpretation, the court then considered other sections of the National Bank Act that refer to banks which are "situated in" or "located in" certain geographic areas and that, like section 36(c), refer to State law of the state in which the bank is located or situated. The court observed that for institutions like the Bank of California with a multi-state branch network, such statutes would function properly only if the bank operations of a branch were controlled by the law of the state in which that branch was located. With respect to section 36(c), the court concluded there was no basis to give the word "situated" a different meaning than "situated" or "located" had in the other sections. The court expressly held that the Bank of California was "situated" in Washington for section 36(c) purposes through its grandfathered branch. 492 F.2d at 51.

The OCC has consistently applied this interpretation of "situated" in section 36(c) -- that a bank is situated in the state(s) where it has branches as well as the state of its main office. This

statutory language and interpretation continue after the Riegle-Neal Act. Existing branch authority in sections 36(a), 36(b), and 36(c) is not changed in the Riegle-Neal Act. The statutory language and legislative history clearly contemplate that existing authority under these provisions remains in effect. First, the new provision on exclusive authority for additional branches (new subsection 36(e)) is not effective until June 1, 1997. In addition, even after it is effective, it expressly does not apply in states in which the bank has its main office or already has a branch; and it also expressly includes, as a continuing source of authority, branching authorized "under this section" (i.e., Revised Statutes § 5155, which includes existing subsections 36(a), (b) & (c)). See Riegle-Neal Act § 102(b)(1) (adding new subsection (e) to section 36)[4].

The Seattle Trust case also dealt with a related issue that is relevant to these Applications. Like the Arkansas branching statute today (discussed below), the Washington State branching statute then expressed the branching powers of state banks by reference to the bank's "principal place of business." In pertinent part, the Washington statute then read: "No bank or trust company shall establish or operate any branch in any city or town outside the city or town in which its principal place of business is located ...." Wash. Rev. Code § 30.40.020 (1970) (quoted in Seattle Trust, 492 F.2d at 52). The Bank of California had branches in Tacoma and

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[4]Indeed, the section of the Riegle-Neal Act that sets out the new source of interstate branching authority in the new interstate merger transaction provides that interstate banks formed under its provisions ("section 44 interstate banks") have a similar rule covering the establishment of additional branches by section 44 interstate banks within each state in which they have existing branches. See Riegle-Act § 102(a) (new section 44(d)(2)). Finally, the provisions in the Riegle-Neal Act regarding state opt-in to permit interstate branching through de novo branches apply only to the de novo establishment of a bank's first branch in another state (other than the bank's home state) "in which the bank does not maintain a branch." See Riegle-Neal Act § 103(a) (adding new subsection 36(g)). It does not apply to situations where a bank is establishing a new branch in its home state or in one of the states in which it already has a branch. In those situations, existing law under section 36(c) still applies.

Seattle, Washington. It applied to the OCC to establish another branch within the city of Seattle. Some of the opponents to that application argued that Bank of California's principal place of business was in San Francisco, not Seattle, and so it was not authorized under the Washington branching provision to have another branch in Seattle. The OCC determined, and the Seattle Trust, court agreed, that -- in applying section 36(c) for the interstate bank -- its current Seattle office would be deemed its "principal place of business" for purposes of the Washington statute. See 492 F.2d at 52-53.

Indeed, this is a necessary corollary to the primary holding in the case that an interstate national bank is situated for section 36 purposes in each state in which it has a branch. Many state branching laws describe state bank branching powers with reference to the bank's "principal place of business," "principal banking office," "home office," "main office," or a similar term. (E.g., a bank can have branches in the same city as, or in the same county as, the bank's principal office.) In the case of an interstate national bank with branches in such a state, if one of the branches were not treated as the principal office for purposes of further in-state branches, then one of two questionable results would occur. Either the bank would have unlimited further branching powers within the state (even beyond in-state geographic limits that state law may impose) because the bank is "situated" in the state and could be thought situated within every branching unit allowed by state law, since it has no specific location. Or the bank would have no further branching authority within the state because it does not qualify under the state's branching statute since it has no principal office in the state. The first result appears inconsistent with one of the purposes of section 36 to allow states to determine branching within the state. The second result contradicts the decision in Seattle Trust and the holding that the bank is situated in each state. Thus, the interpretation that one of the branches in the state is

treated as its principal office in that state for purposes of state branching law is reasonable.[5]

Therefore, after the main office relocation, CNB continues to be situated in Arkansas for section 36(c) purposes by virtue of its existing branches there. Under Arkansas law, Arkansas banks are permitted to establish branches, inter alia, "anywhere within the county in which the establishing bank's principal banking office is located." Ark. Code Ann. § 23-32-1202(b)(1) (Michie 1993). Although CNB's main office will be in Texarkana, Texas, the bank is considered -- in order to incorporate state branching location limits under section 36(c) -- to have its "principal place of business" in Miller County (the county in which its existing branches are located) for purposes of applying Arkansas branching law to its branching within Arkansas. See Seattle Trust, 492 F.2d at 52-53 (adopting this usage for "principal place of business" in similar Washington statute). The proposed branch location at the site of the former main office in Texarkana, Arkansas, is also within Miller County. An Arkansas bank with its principal place of business within Miller County could establish a branch at that location. Accordingly, CNB may establish a branch at that location under 12 U.S.C. § 36(c).[6]

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[5]A similar outcome appears contemplated in the Riegle-Neal Act. After an interstate merger under the provisions of the Riegle-Neal Act, the section 44 interstate bank will have its main office in one state and branches in its other states. After the interstate merger, the Act provides that the section 44 interstate bank may establish additional branches at any location where any bank involved in the transaction could have established branches under applicable law if such bank had not been a party to the section 44 interstate merger. See Riegle-Neal Act § 102(a) (new section 44(d)(2)). In states in which the branching law is expressed by reference to a "principal office," this seems to imply that the former principal office of the merged bank (which office is now a branch of the interstate bank) will be deemed the principal office for additional in-state branching purposes.

[6]The establishment of the branch at the former main office site is also authorized under section 36(c) through the additional state law branching authority in Ark. Code. Ann. § 23-32-1202(b)(2) (a bank that relocates its principal banking office may continue to use former principal office location as a branch).

C. Congress Re-affirmed this Existing Authority for National Banks under Federal Law in the Statutory Language and Legislative History of the Riegle-Neal Act.

Our analysis of the legal authority for these Applications is based on current law, in particular 12 U.S.C. §§ 30 & 36(c). The recently enacted interstate banking and branching legislation does not change the legal analysis and result, and indeed has confirmed it. See Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (enacted September 29, 1994) (the "Riegle-Neal Act"). The Riegle-Neal Act adds a new section 44 to the Federal Deposit Insurance Act that authorizes certain interstate branching transactions beginning on June 1, 1997. It also makes conforming amendments to the provisions on mergers and consolidations of national banks (adding a new section that follows 215 and 215a) and to the McFadden Act (adding a new subsection 36(d)) that add merger and branching provisions for national banks to correspond to the section 44 transactions. See Riegle-Neal Act §§ 102(b)(1)(B) & 102(b)(4).

The statutory changes and legislative history of the Riegle-Neal Act shows that Congress was completely aware of the OCC's prior interstate main office relocation decisions. Those decisions involved the OCC's interpretation and application of sections 30, 36, and 215a in the manner set forth above. See OCC NationsBank/Maryland National Decision; OCC First Fidelity/New Jersey Decision. In addition, other OCC decisions prior to the Riegle-Neal Act also had involved similar issues and analysis. See OCC decisions listed in notes 1 & 2 above. In the Riegle-Neal Act Congress did not change these sections or express any disagreement with OCC's interpretation and application of them (except for the change to branch retention under section 30 discussed below). And even the change in branch retention under section 30 does not occur until June 1, 1997. The fact that Congress, during legislation in which it was comprehensively considering interstate branching, left these statutes and OCC interpretation of them unaffected is

conclusive evidence that the intended meanings of sections 30, 36, and 215a in the interstate context are those previously expressed by the OCC and set out above. Our analysis of the relationship of the Riegle-Neal Act to existing law was discussed in more detail in the OCC Bank Midwest Decision (Part II-D), and only a summary will be presented here.

Congress did not alter existing authority in sections 36(a), 36(b) and 36(c) or in sections 215 and 215a. The statutory language and legislative history clearly contemplate that existing authority under these provisions remains in effect. First, the language of these sections is not changed. Second, the legislative history contains no indication of any intent to modify the operation of these sections. Third, nothing in the new sections added in the Riegle-Neal Act necessarily conflicts with any authority in these sections. For example, the provision on exclusive authority for additional branches (subsection 36(e)) is not effective until June 1, 1997. In addition, even after it is effective, it expressly does not apply in states in which the bank has its main office or already has a branch; and it also expressly includes, as a continuing source of authority, branching authorized "under this section" (i.e., Revised Statutes § 5155, which includes subsections 36(a), 36(b), and 36(c)). See Riegle-Neal Act § 102(b)(1) (adding new subsection (e) to section 36).

The Riegle-Neal Act also does not change section 30 with respect to the power to change the location of the main office across a state line. But it does change sections 30 and 36 with respect to the power of the bank to keep existing branches in the state from which it relocated. See Riegle-Neal Act §§ 102(b)(1) (adding new subsection (e) to section 36) & 102(b)(2) (adding new subsection (c) to section 30). However, this change to the authority to continue existing branches in a relocation does not take effect until June 1, 1997

The legislative history of these changes is especially illuminating. The Conference Report expressly shows that

Congress was aware of existing authority and of OCC analyses and approvals under that authority (such as the OCC NationsBank/Maryland National Decision, the OCC First Fidelity/New Jersey Decision, and the other decisions cited in notes 1 and 2 above) and expected it to continue until June 1. 1997:

> The Comptroller of the Currency (OCC) has used the 30 mile relocation provision of the National Bank Act (section 2 of the Act of May 1, 1886, 12 U.S.C. 30), to approve several transactions which have permitted national banks to move their main offices to other States but to retain branches in the States left by the main offices. Section 102(b)(2) amends the provision so that after June 1, 1997, a national bank relocating its main office to another state may maintain its branches in the first state only if those branches could have been established by a bank with its home State in the new State....
>
> The Conferees are aware of the OCC procedures in permitting relocation across state lines. The Conferees concur with those procedures. including the application of appropriate State law and authority. The Conferees expect the OCC to continue to follow those procedures until the provisions of Title I become fully applicable on June 1, 1997.

H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 57 (August 2, 1994) (emphasis added). This statement clearly shows a Congressional understanding that under existing law a national bank can move its main office across State lines while keeping branches in its former State and that this existing authority is being changed by the amendment. We believe the reference in the Conference Report to the OCC's prior decisions includes all

aspects of the prior decisions, and not merely the analysis of main office relocation and branch retention under section 30. If the other aspects of the legal analysis in the prior decisions (i.e., the issues raised under sections 36 and 215a) were not also valid, the final results in those decisions would not have been legally authorized. In that event, Congress' concurrence in the decisions would have been a nullity.

Thus, these Applications are authorized under existing federal law for national banks. In the Riegle-Neal Act, Congress confirmed that existing authority, changed the authority under section 30 beginning June 1, 1997, and understood that transactions such as this one would occur until that date.

D. State Laws that Conflict with Federal Law Conferring this Authority on National Banks Cannot be Applied to Prevent or Restrict these Applications.

As we have seen, the transactions proposed by CNB in these Applications are authorized under federal law. The Arkansas and Texas Banking Commissioners have objected to them, raising both legal issues under state laws and policy concerns. Some of these objections are similar to those raised by the Kansas Bank Commissioner with respect to a transaction in Kansas. See OCC Bank Midwest Decision. That Decision should also be consulted for a fuller discussion of state law issues.

The Arkansas Commissioner states that the Arkansas Code does not provide for or permit interstate branching and therefore, the approval of CNB's Applications -- which would allow CNB to maintain branches in Arkansas after the main office is in Texas -- "would clearly be in contravention of state law." Arkansas Commissioner Letter at 2. The only provision of the Arkansas Code to which the Commissioner refers is the provision governing branching by Arkansas-chartered banks, in particular the provisions that limit branches to locations within Arkansas:

> 23-32-1202. Establishment of full service branch offices -- Locations.
>
> (a) No banking institution shall engage in the business of banking at any location other than at a principal banking office or branch bank in this state except as otherwise permitted by law.
>
> .....
>
> (b)(4) After December 31, 1998, a bank may locate one (1) or more full service branches and customer-bank communications terminals anywhere in this state.

Ark. Code Ann. §§ 23-32-1202(a) & (b)(4) (emphasis supplied by Commissioner). However, this provision is the provision for branching by Arkansas-chartered banks. It apparently authorizes Arkansas banks to have branches only in Arkansas. But it does not address at all whether out-of-state banks can have branches in Arkansas.

Moreover, the Commissioner appears to assume that a national bank in CNB's position can have branches in Arkansas only in accordance with express state law, and that the absence of such express Arkansas authority for interstate branches means that CNB's branches are unlawful. However, this is incorrect as a matter of law for several reasons. First, the authority of CNB to have branches in Arkansas is determined by federal law, not state law. CNB may retain the branches in Arkansas in its main office relocation under the authority of 12 U.S.C. § 30, and state law is not a factor under section 30 at all; and so the branches in Arkansas are retained without any consideration of either Arkansas or Texas law. See, e.g., Ramapo Bank, 425 F.2d at 344, McEnteer, 644 F.Supp. at 292-93; OCC Bank Midwest Decision (Parts II-A, II-D, III). CNB may establish the former main office (and additional branches) as a branch in

Arkansas under 12 U.S.C. § 36(c). While state law is a factor under section 36(c), the state law incorporated therein is the law for branching within Arkansas by Arkansas state banks because CNB is situated in Arkansas for section 36 purposes. See, e.g., Seattle Trust, 492 F.2d at 51; Parts II-B and II-C above; OCC Bank Midwest Decision (Parts II-B, II-D). It is federal law, not state law, that sets the authority for national bank branches. Although some aspects of state law are incorporated into federal law, it is federal law that determines which aspects of state law are so incorporated, and in what manner they are incorporated. Under Seattle Trust, the manner in which Arkansas law is relevant is the state branching provision for branching within Arkansas by Arkansas banks. Moreover, this interpretation of sections 30 and 36 was expressly approved by Congress in the Riegle-Neal Act.

Even if Arkansas had a state law that expressly prohibited out-of-state banks from having branches in Arkansas (or if section 23-32-1202(a) were interpreted to be such a law), such a state law could not constitutionally be applied to prevent these proposed transactions. The state law would conflict with the authority granted to national banks under federal law in 12 U.S.C.§§ 30 & 36, and so it would be preempted. See, e.g. Ramapo Bank, 425 F.2d at 344; McEnteer, 644 F.Supp. at 292-94; OCC Bank Midwest Decision (Part III-A). In addition, it would impose an impermissible burden on interstate commerce because it bars out-of-state businesses from entry into Arkansas and does so without congressional authorization, and so it would violate the Commerce Clause. See OCC Bank Midwest Decision (Part III-B).[7]

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[7]This analysis applies equally to CNB's brick-and-mortar branches and to customer-bank communications terminal branches. Under Arkansas law, "[n]o bank organized under the laws of, or having its main office in, any other state may establish, maintain, or operate a customer-bank communications terminal in this state." Ark. Code Ann. § 23-32-1305. Since CNB continues to be situated in Arkansas, under Seattle Trust it would be considered to have a "main office"

The Texas Banking Commissioner raises an objection similar to that of Arkansas. She maintains that under Texas branching law Texas state banks are authorized to establish branches only within Texas and there is no authority for Texas banks to have branches in another state.[8] She then asserts that CNB, once it has relocated its main office into Texas, has only the branching authority that a Texas state bank would have, and therefore the maintenance of branches in another state, in this

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in Arkansas for in-state purposes under section 23-32-1305, see 492 F.2d at 52-53 (discussed above on pages 7-8), and so it would comply with section 23-32-1305. But, if section 23-32-1305 were construed such that CNB was considered an out-of-state bank, then application of the statute to CNB would be invalid under federal law, for the reasons discussed above.

[8]The Texas statute provides in pertinent part:

> Art. 342-903. Branch Banking
>
> Sec. 1 (a) A state bank may engage in the business of accepting demand deposits and making commercial loans at its principal banking office and at any other approved branch office location.
>
> . . . .
>
> (c) Branch offices may be established anywhere in the state on prior written approval of the Banking Commissioner. . .

Tex. Rev. Civ. Stat. art. 342-903(1)(a) & (c) (West 1994) (emphasis added by Commissioner). The Commissioner's Letter refers only to subsection (1)(c). It is not clear that Texas state banks do not have power to have branches in other states. The grant of authority in subsection (1)(a) does not have an in-state limitation. Subsection (1)(c) appears to be a procedural provision that branches in the state can be opened only with prior approval of the Commissioner. It also sets out provisions for approval standards, application fees, and application forms. The in-state limitation appears only there. Since CNB would not be subject to an in-state limit on Texas state banks in any event, it does not matter whether Texas state banks have the power to have branches in Arkansas or not; and so we need not address that issue further.

case Arkansas, would be in contravention of the Texas branching statute. See Texas Commissioner Letter at 1. The Texas Commissioner makes the same incorrect assumption about governing law as the Arkansas Commissioner. National banks' branching authority is not subject to state law, but to federal law. While federal law incorporates state law provisions to some extent, it is federal law that is the governing law, and it is a federal determination what (and how) state provisions apply.

Here, CNB is not subject to Texas law; it is subject to 12 U.S.C. §§ 30 & 36(c). The authority of CNB to have branches in Arkansas is determined by federal law, not state law. CNB may retain the branches in Arkansas in its main office relocation under the authority of section 30, and state law is not a factor under section 30 at all; and so the branches in Arkansas are retained without any consideration of either Arkansas or Texas law. See, e.g., Ramapo Bank, 425 F.2d at 344; McEnteer, 644 F.Supp. at 292-93; OCC Bank Midwest Decision (Parts II-A, II-D, III). CNB may establish the former main office (and additional branches) as a branch in Arkansas under 12 U.S.C. § 36(c). While state law is a factor under section 36(c), the state law incorporated therein, for the branches in Arkansas, is the law for branching within Arkansas by Arkansas state banks, not Texas law for branching by Texas banks, because CNB is situated in Arkansas for section 36 purposes. See, e.g., Seattle Trust, 492 F.2d at 51; Parts II-B and II-C above; OCC Bank Midwest Decision (Parts II-B, II-D). It is federal law, not state law, that sets the authority for national bank branches. Although some aspects of state law are incorporated into federal law, it is federal law that determines which aspects of state law are so incorporated, and in what manner they are incorporated. Under Seattle Trust, for subsequent branches in Arkansas, the relevant state law is the Arkansas branching provision for branching within Arkansas by Arkansas banks, not Texas law; Texas law is relevant for subsequent branching by CNB in Texas. Moreover, this

interpretation of sections 30 and 36 was expressly approved by Congress in the Riegle-Neal Act.

The Texas Bank Commissioner also claims the relocation of CNB into Texas would cause Commercial Bancshares to be in violation of Texas bank holding company provisions. Under Texas law, an out-of-state bank holding company may acquire a bank located in Texas, but until the year 2001, this authority is available only if, inter alia, each bank in Texas to be owned by the out-of-state holding company has existed and continuously operated as a bank for at least five years. See Tex. Rev. Civ. Stat. art. 342-916 (West 1994).[9] The Commissioner claims CNB would not qualify as a bank in Texas that has been continuously operated for a period of five years. Thus, Commercial Bancshares would not be in compliance with Article 342-916.

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[9]The Texas statute provides in pertinent part:

> Art. 342-916. Out-of-State Bank Holding Companies--Authorization--Limitations
>
> Sec. 1. Except as otherwise provided by this article, an out-of-state bank holding company may, directly or indirectly, acquire or acquire control of a state bank, national bank located in the state, or bank holding company owning or controlling, directly or indirectly, a state bank or national bank located in the state.
>
> Sec. 2. (a) Before September 1, 2001, the authority granted by Section 1 of this article is available to an out-of-state bank holding company only if each state bank or national bank in this state that would, on the effective date of the transaction, be owned or controlled, directly or indirectly, by the out-of-state bank holding company:
>
> (1) existed [before July 15, 1986 . . .]; or
>
> (2) has existed and continuously operated as a bank for a period of at least five years.

Tex. Rev. Civ. Stat. art. 342-916 (West 1994).

However, this is legally incorrect for several reasons. First, Article 342-916, by its own terms, does not apply to this transaction. Article 342-916 applies to an out-of-state holding company's acquisition of a bank in Texas. Commercial Bancshares already owns CNB, and so it is not making an acquisition. There does not appear to be a definition of "acquire" in the Texas bank holding company provisions. But, the Texas application procedures are triggered only when an application is made under section 3 of the federal Bank Holding Company Act (12 U.S.C. §1842). See Tex. Rev. Civ. Stat. art. 342-912, sections (1) and (4) (West 1994). Thus, it is likely that the meaning of the similar terms in the Texas statute follows that in the federal statute. The relocation of a national bank's main office is not an acquisition on the part of the holding company under the federal BHCA. See e.g., Synovus Financial Corporation, 952 F.2d at 434-37; OCC Bank Midwest Decision (Part II-A-1-c). Thus, it is not an acquisition for the Texas statute as well. Moreover, since the Texas procedures are applicable only when there is a federal application, when there is no federal application required (as here), the Texas statute does not apply.[10]

Second, the relocation of a national bank's main office is governed exclusively by 12 U.S.C. § 30, and any state law that conflicts with the authority granted is preempted. See, e.g., Ramapo Bank, 425 F.2d at 344; McEnteer, 644 F.Supp. at 292-94; OCC Bank Midwest Decision (Parts II-A-1-c and III-A).

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[10]Moreover, even if Article 342-916 applied, it is not clear that CNB would not qualify under it. CNB has been in existence and continuously operated as a bank for more than five years. The Texas statute does not expressly require that the bank have been in operation in Texas for five years. Cf. Synovus Financial Corporation, 952 F.2d at 430-31 (Board's interpretation of similar five year requirement in Georgia statute).

Thus, even if Article 342-916 purported to apply to this transaction, it would be preempted.[11]

Third, if Article 342-916 purported to apply to this transaction, it would also violate the Commerce Clause. As discussed above, the relocation is not subject to section 3(a) of the federal BHCA, and thus it is also not within section 3(d) (the Douglas Amendment). Therefore, with respect to this transaction, the Texas statute would be operating outside the congressional authority granted the states in the Douglas Amendment. See OCC Bank Midwest Decision (Part III-B-1). Without that authority from Congress, a state statute forbidding out-of-state companies from owning a business in Texas is a clearly impermissible burden on interstate commerce, and thus violates the Commerce Clause. See e.g., Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 37-44 (1980); McEnteer, 644 F.Supp. at 294; Kansas Attorney General Opinion No. 94-128 (September 21, 1994); 69 Maryland Op.

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[11]In reviewing the preemption issues in this corporate application, we have not used the notice and comment procedures added in the Riegle-Neal Act for preemption determinations involving state laws in the areas of community reinvestment, consumer protection, fair lending, and establishment of intrastate branches. See Riegle-Neal Act § 114 (adding new Revised Statutes § 5244). First, the Texas bank holding company provision is not within one of the four areas. While the Texas and Arkansas branching provisions are intrastate branching provisions, but they are not being preempted with respect to intrastate branching within each state. Second, even if the determinations here were within one of the four areas, court cases and prior OCC decisions have previously addressed the preemptive effect of section 30 and the application of section 36(c) for interstate banks. Thus, this matter would qualify for the exception in section 5244(c)(1)(A). Third, it is not clear that the new procedure in the Riegle-Neal Act covers matters that do not arise in an opinion letter or interpretive rule, but in a corporate application decision in a process that has its own public notice and comment requirement. Finally, the preemption determinations here are secondary. The primary conclusions are that these state statutes do not apply in a way that would prevent this transaction. It is only if the statutes were otherwise interpreted that the preemption analysis occurs.

Att'y Gen. 37, 45-49 (1984); OCC Bank Midwest Decision (Part III-B-2).

Both the Arkansas Bank Commissioner and the Texas Bank Commissioner also point to the Riegle-Neal Act for further support of their positions. They maintain the Act reserves to the states the authority to determine whether each state will permit interstate branching and that the approval of CNB's Applications thus would contravene the authority the Act gives the states. The Commissioners are reading the Act too broadly. In the Riegle-Neal Act, Congress has provided an additional authority for interstate mergers in the new section 44 of the Federal Deposit Insurance Act. Congress also provided that a state can "opt-out" of section 44 interstate mergers by enacting appropriate state legislation. See Riegle-Neal Act § 102(a) (new section 44(a)(2)). Congress also provided that de novo establishment of an out-of-state bank's first branch in a state could occur only if the state allowed it. See Riegle-Neal Act § 103. However, Congress also left existing relocation, merger, and branching authority in place. Interstate transaction that occur under existing authority are unaffected (except for changes to section 30 that begin on June 1, 1997). There is no evidence of an intent to give states any authority over them. Indeed, as discussed above in Part II-C, Congress was expressly aware of interstate transactions involving section 30 and expected them to continue until June 1, 1997. Thus, the Commissioners' contention that approval of CNB's Applications would violate the Riegle-Neal Act is incorrect.

Finally, the Commissioners' references to the Riegle-Neal Act also include a policy-based objection, as well as a legal one. They suggest that approval of these Applications would be outside the "opt-out" process outlined in the Act and so would be contrary to the desires of Congress. They imply that approval might affect the states' deliberations whether to opt out. However, although Congress granted the States the power to "opt out" of the interstate mergers authorized in section 102 of

the Act, the Act also specifically contemplates that existing interstate main office relocation authority remains in effect until June 1, 1997, and Congress expressly expected the OCC to continue to follow existing law until then, permitting interstate transaction using main office relocations. Therefore, until June 1, 1997, applications filed with the OCC must be reviewed under applicable existing law. It would be inappropriate regulatory policy, and inconsistent with express Congressional intent, to delay action on applications between now and June 1, 1997, a period of more than two years, rather than processing them under current law.

E. Conclusion

In conclusion, our legal analysis of these Applications follows our analysis of prior interstate relocation decisions and other prior decisions involving interstate national banks. The relocation of CNB's main office from Texarkana, Arkansas, to Texarkana, Texas, is authorized under 12 U.S.C. § 30. CNB may continue to operate its existing branches in Arkansas. CNB may also establish a branch at the location of its old main office in Texarkana, Arkansas, under 12 U.S.C. § 36(c). Accordingly, these Applications are legally authorized.

III. ADDITIONAL STATUTORY AND POLICY REVIEWS

The Community Reinvestment Act requires the OCC to take into account the applicant's record of helping to meet the credit needs of its entire community, including low- and moderate- income neighborhoods, when evaluating certain application. See 12 U.S.C. §2903. CNB has received a satisfactory rating from the OCC with respect to its CRA performance. There have been no public comments received by the OCC relating to these Applications that would cause the OCC to question the bank's performance in complying with the CRA.

The relocation and operation of interstate branches should have no adverse affect on the bank's CRA performance. The Texas portion of Texarkana is already part of the bank's service area. The bank will continue to serve the same delineated communities with the same CRA statement, policies, programs, and personnel that it has today. The relocation and operation of interstate branches do not alter the bank's obligation to help meet the credit needs of its community on both sides of the state line.

IV. CONCLUSION AND APPROVAL

For the reasons set forth above, the Relocation Application and the Branch Application are legally authorized under 12 U.S.C. §§ 30 and 36. The transactions also meet the criteria for approval under other statutory factors. Accordingly, these Applications are hereby approved.

_____ _____

Frank Maguire
Senior Deputy Comptroller
for Corporate Activities
and Policy Analysis

Date

Application Control Numbers: 94-SW-07-0036 & 94-SW-05-0120

Supreme Court, U.S.
FILED

97 1078 DEC 23 1997

No. ____ OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

CATHERINE A. GHIGLIERI, TEXAS BANKING COMMISSIONER,
Petitioner

v.

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY;
SUN WORLD NATIONAL ASSOCIATION, EL PASO, TEXAS; AND
COMMERCIAL NATIONAL BANK OF TEXARKANA,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit
Case Nos. 96-50847 and 96-10818

PETITIONER'S APPENDIX VOLUME III

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115 pp

TABLE OF CONTENTS
APPENDIX

A. *Ghiglieri v. Sun World National Association*, Opinion of the United States Court of Appeals for the Fifth Circuit, Case Nos. 96-50847, 96-50948 (July 22, 1997).

B. *Ghiglieri v. Ludwig*, Opinion of the United States Court of Appeals for the Fifth Circuit, Case No. 96-10818 (October 29, 1997).

C. *Ghiglieri v. Sun World National Association*, Memorandum Opinion and Order, United States District Court for the Northern District of Texas (October 29, 1996).

D. *Ghiglieri v. Ludwig*, Findings of Fact and Conclusions of Law of the United States District Court for the Western District of Texas (May 22, 1996).

E. Decision of the Office of the Comptroller of the Currency on the Applications of Sun World, National Association, El Paso, Texas (August 2, 1996).

F. Decision of the Office of the Comptroller of the Currency on the Applications of Commercial National Bank of Texarkana, Texarkana, Arkansas (March 8, 1995).

G. Denial of Petition for Rehearing and Suggestion for Rehearing En Banc, United States Court of Appeals for the Fifth Circuit (September 25, 1997).

H. 12 U.S.C. § 36.

I. ARK. CODE ANN. § 23-32-1202 (Michie 1994).

J. N.M. STAT. ANN. § § 58-1C-4, 58-1C-5, 58-1C-6, 58-1C-7, 58-1C-8 (1996).

K. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, [H.R. 3841] (later, Pub. L. No. 103-328, 108 Stat. 2338 (September 29, 1994)).

L. Joint Explanatory Statement of the Committee of Conference, H.R. CONF. REP. NO. 651, 103d Cong., 2d Sess. 47 *et seq.* (Aug. 2, 1994).

M. Prepared Statement of Chairman D'Amato before Financial Institutions Subcommittee (May 1, 1997).

N. Affidavit of James J. Saxon.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 96-50847

CATHERINE A GHIGLIERI, in her official capacity as Texas Banking Commissioner

Plaintiff - Appellee

v.

SUN WORLD NATIONAL ASSOCIATION, EL PASO, TEXAS, ET AL

Defendants

SUN WORLD NATIONAL ASSOCIATION, EL PASO, TEXAS; EUGENE A LUDWIG, in his official capacity as the United States Comptroller of the Currency

Defendants - Appellants

NO. 96-50948

CATHERINE A GHIGLIERI, in her official capacity as Texas Banking Commissioner

Plaintiff - Appellee

v.

SUN WORLD NATIONAL ASSOCIATION, EL PASO, TEXAS, ET AL

Defendants

SUN WORLD NATIONAL ASSOCIATION, EL PASO, TEXAS

Defendants - Appellants

Appeals from the United States District Court for the Western District of Texas, El Paso

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ON PETITION FOR REHEARING AND
SUGGESTION OR REHEARING EN BANC

(Opinion July 22, 1997, 5 Cir., F.3d)

Before JOLLY, DUHE' and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____
United States Circuit Judge

Filed September 25, 1997
REHG-4

Section 36 of Title 12, United States Code, provides in pertinent part:

§ 36. Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

(a) Lawful and continuous operation

A national banking association may retain and operate such branch or branches as it may have had in lawful operation on February 25, 1927, and any national banking association which continuously maintained and operated not more than one branch for a period of more than twenty-five years immediately preceding February 25, 1927, may continue to maintain and operate such branch.

(b) Converted State banks

(1) A national bank resulting from the conversion of a State bank may retain and operate as a branch any office which was a branch of the State bank immediately prior to conversion if such office --

(A) might be established under subsection (c) of this section as a new branch of the resulting national bank, and is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank;

(B) was a branch of any bank on February 25, 1927; or

(C) is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the national bank) resulting from the conversion of a national bank would be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the national bank immediately prior to conversion.

(2) A national bank (referred to in this paragraph as the "resulting bank"), resulting from the consolidation of a national bank (referred to in this paragraph as the "national bank") under whose charter the consolidation is effected with another bank or banks, may retain and operate as a branch any office which, immediately prior to such consolidation, was in operation as --

(A) a main office or branch office of any bank (other than the national bank) participating in the consolidation if, under subsection (c) of this section, it might be established as a new branch of the resulting bank, and if the Comptroller of the Currency approves of its continued operation after the consolidation;

(B) a branch of any bank participating in the consolidation, and which, on February 25, 1927, was in operation as a branch of any bank; or

(C) a branch of the national bank and which, on February 25, 1927, was not in operation as a branch of any bank, if the Comptroller of the Currency approves of its continued operation after the consolidation.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the resulting national bank) resulting from the consolidation into a State bank of another bank or banks would be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the State bank immediately prior to consolidation.

(3) As used in this subsection, the term "consolidation" includes a merger.

(c) New branches

A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. . . .

(d) Branches resulting from interstate merger transactions

A national bank resulting from an interstate merger transaction (as defined in section 1831u(f)(6) of this title) may maintain and operate a branch in a State other than the home State (as defined in subsection (g)(3)(B) of this section) of such bank in accordance with section 1831u of this title.

(e) Exclusive authority for additional branches

(1) [omitted]

(2) Retention of Branches

In the case of a national bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State which was the bank's home State (as defined in subsection (g)(3)(B) of this section) before the relocation of such office only to the extent the bank would be authorized, under this section or any other provision of law referred to in paragraph (1), to acquire, establish, or commence to operate a branch in such State if—

(A) the bank had no branches in such State; or

(B) the branch resulted from—

(i) an interstate merger transaction approved pursuant to section 1831u of this title; or

(ii) a transaction after May 31, 1997, pursuant to which the bank received assistance from the Federal Deposit Insurance Corporation under section 1823(c) of this title.

ARK. CODE ANN. § 23-32-1202 (Michie 1994) (emphases added):

23-32-1202. Establishment of full service branch offices — Locations.

(a) No banking institution shall engage in the business of banking at any location other than at a principal banking office or branch bank *in this state* except as otherwise permitted by law.

(b) Any bank may establish a full service branch and may establish, maintain, and use a customer-bank communication terminal, as that term is defined in § 23-32-1301, provided that its supervisory banking authority approves its application for the full service branch. Full service branches and customer-bank communication terminals may only be established as follows:

(1) A bank may establish full service branches and customer-bank communication terminals anywhere within the county in which the establishing bank's principal banking office is located;

(2) A bank which relocates its principal banking office may continue to use its former principal banking office location as a full service branch and customer-bank communication terminal so long as the use as a banking facility is uninterrupted;

(3) In addition to subdivisions (b)(1) and (b)(2) of this section, after December 31, 1993, a bank may relocate one (1) or more full service branches and customer-bank communication terminals anywhere within any counties contiguous to the county in which its principal banking office is located;

(4) After December 31, 1998, a bank may locate one (1) or more full service branches and customer-bank communication terminals *anywhere in this state*.

FINANCIAL INSTITUTIONS AND REGULATIONS
ARTICLE 1C
Interstate Bank Branching

58-1C-4. Authority of state banks to establish interstate branches by merger.

A. If it obtains the prior approval of the director, a New Mexico state bank may establish, maintain and operate one or more branches in a state other than New Mexico pursuant to an interstate merger transaction in which the New Mexico state bank is the resulting bank.

B. Not later than the date on which the required application for the interstate merger transaction is filed with the responsible federal bank supervisory agency, the applicant New Mexico state bank shall file the documents and information required by Subsections A and B of Section 58-4-4 NMSA 1978 and pay a fee in an amount that shall be prescribed by the director by rule.

C. The director shall approve the interstate merger transaction and the operation of branches outside of New Mexico by the New Mexico state bank if he finds that:

(1) the proposed transaction will not be detrimental to the safety and soundness of the applicant or the resulting bank;

(2) any new officers and directors of the resulting bank are qualified by character, experience and financial responsibility to direct and manage the resulting bank; and

(3) the proposed merger is consistent with the convenience and needs of the communities to be served by the resulting bank in this state and is otherwise in the public interest.

D. The interstate merger transaction may be effected only after the applicant has received the director's written approval.

58-1C-5. Interstate merger transactions and branching permitted.

A. One or more New Mexico banks may enter into an interstate merger transaction with one or more out-of-state banks pursuant to the Interstate Bank Branching Act [58-1C-1 to 58-1C-13 NMSA 1978], and an out-of-state bank resulting from the transaction may maintain and operate as branches in New Mexico the former New Mexico banks that participated in the transaction if the conditions and filing requirements of that act are met.

B. Except as otherwise expressly provided in this subsection, an interstate merger transaction is not permitted pursuant to the Interstate Bank Branching Act if, upon effecting the transaction, the resulting bank, including all insured depository institutions that would be affiliates, as defined in 12 U.S.C.A. Section 1841(k), of the resulting bank, would result in an undue concentration of deposits totaling forty percent or more of the total deposits in all depository institutions in New Mexico. The director may by regulation adopt a procedure to waive the foregoing prohibition to prevent the insolvency or closing of a New Mexico state bank.

C. An interstate merger transaction resulting in the acquisition by an out-of-state bank of a new Mexico bank is not permitted pursuant to the Interstate Bank Branching Act, unless the New Mexico bank on the date of the acquisition has been in continuous operation under an active charter for a period of at least five years.

5-1C-6. De novo branching and acquisition of individual branches not permitted.

Interstate branching, either de novo or by acquisition of one or more branches, not involving all or substantially all of the assets and branches of a new Mexico bank is prohibited.

58-1C-8. Condition for interstate merger prior to June 1, 1997.

An interstate merger transaction prior to June 1, 1997 resulting in a New Mexico branch of an out-of-state bank shall not be consummated and any out-of-state bank resulting from such a merger shall not operate a branch in New Mexico, unless the director first:

A. finds that the laws of the home state of each out-of-state bank involved in the interstate merger transaction permit New Mexico state banks, under substantially the same terms and conditions as are set forth in the Interstate Bank Branching Act [58-1C-1 to 58-1C-13 NMSA 1978], to acquire banks and establish and maintain branches in that state by means of interstate merger transactions;

B. concludes that the resulting out-of-state bank has complied with all applicable requirements of New Mexico law and has agreed in writing to comply with the laws of this state applicable to its operation of branches in New Mexico; and

C. certifies to the federal bank supervisory agency having authority to approve the interstate merger transaction that the conditions and requirements of the Interstate Bank Branching Act have been met.

H.R.3841

One Hundred Third Congress

of the

United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday, the twenty-fifth day of January, one thousand nine hundred and ninety-four

An Act

To amend the Bank Holding Company Act of 1956, the Revised Statutes of the United States, and the Federal Deposit Insurance Act to provide for interstate banking and branching.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE- This Act may be cited as the 'Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994'.

(b) TABLE OF CONTENTS- The table of contents for this Act is as follows:

TITLE I--INTERSTATE BANKING AND BRANCHING

Sec. 101. Interstate banking.

Sec. 102. Interstate bank mergers.

Sec. 103. State 'opt-in'election to permit interstate branching through de novo branches.

Sec. 104. Branching by foreign banks.

Sec. 105. Coordination of examination authority.

Sec. 106. Branch closures.

Sec. 107. Equalizing competitive opportunities for United States and foreign banks.

Sec. 108. Federal Reserve Board study on bank fees.

Sec. 109. Prohibition against deposit production offices.

Sec. 110. Community Reinvestment Act evaluation of banks with interstate branches.

Sec. 111. Restatement of existing law.

Sec. 112. GAO report on data collection under interstate branching.

Sec. 113. Maximum interest rate on certain FMHA loans.

Sec. 114. Notice requirements for banking agency

decisions preempting State law.

Sec. 115. Moratorium on examination fees under the International Banking Act of 1978.

TITLE II--GENERAL PROVISIONS

Sec. 201. Amendments to Federal Deposit Insurance Act and Federal Home Loan Bank Act.

Sec. 202. Sense of the Senate concerning multilateral export controls.

Sec. 203. Amendments relating to silver medals for Persian Gulf veterans.

Sec. 204. Commemoration of 1995 Special Olympic World Games.

Sec. 205. National Community Service Commemorative Coins.

Sec. 206. Robert F. Kennedy Memorial Commemorative Coins.

Sec. 207. United States Military Academy Bicentennial Commemorative Coins.

Sec. 208. United States Botanic Garden Commemorative Coins.

Sec. 209. Mount Rushmore Commemorative Coins.

Sec. 210. Study and report on the United States financial

services system.

Sec. 211. Flexibility in choosing boards of directors.

TITLE I--INTERSTATE BANKING AND BRANCHING

SEC. 101. INTERSTATE BANKING.

(a) IN GENERAL- Section 3(d) of the Bank Holding Company Act of 1956 (12 U.S.C. 1842(d)) is amended to read as follows:

'(d) INTERSTATE BANKING-

'(1) APPROVALS AUTHORIZED-

'(A) ACQUISITION OF BANKS- The Board may approve an application under this section by a bank holding company that is adequately capitalized and adequately managed to acquire control of, or acquire all or substantially all of the assets of, a bank located in a State other than the home State of such bank holding company, without regard to whether such transaction is prohibited under the law of any State.

'(B) PRESERVATION OF STATE AGE LAWS-

'(i) IN GENERAL- Notwithstanding subparagraph (A), the Board may not approve an application pursuant to such subparagraph that would have the effect of permitting an out-of-State bank holding company to acquire a bank in a host State that has not been in existence for the minimum period of time, if any, specified in the statutory law of the host State.

'(ii) SPECIAL RULE FOR STATE AGE LAWS SPECIFYING A PERIOD OF MORE THAN 5 YEARS- Notwithstanding clause (i), the Board may approve, pursuant to subparagraph (A), the acquisition of a bank that has been in existence for at least 5 years without regard to any longer minimum period of time specified in a statutory law of the host State.

'(C) SHELL BANKS- For purposes of this subsection, a bank that has been chartered solely for the purpose of, and does not open for business prior to, acquiring control of, or acquiring all or substantially all of the assets of, an existing bank shall be deemed to have been in existence for the same period of time as the bank to be acquired. '(D) EFFECT ON STATE CONTINGENCY LAWS- No provision of this subsection shall be construed as affecting the applicability of a State law that makes an acquisition of a bank contingent upon a requirement to hold a portion of such bank's assets available for call by a State-sponsored housing entity established pursuant to State law, if-- '(i) the State law does not have the effect of discriminating against out-of-State banks, out-of-State bank holding companies, or subsidiaries of such banks or bank holding companies;

'(ii) that State law was in effect as of the date of enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994;

'(iii) the Federal Deposit Insurance Corporation has not determined that compliance with such State law would result in an unacceptable risk to the appropriate deposit insurance fund; and

'(iv) the appropriate Federal banking agency for such bank

has not found that compliance with such State law would place the bank in an unsafe or unsound condition. '(2) CONCENTRATION LIMITS-

'(A) NATIONWIDE CONCENTRATION LIMITS- The Board may not approve an application pursuant to paragraph (1)(A) if the applicant (including all insured depository institutions which are affiliates of the applicant) controls, or upon consummation of the acquisition for which such application is filed would control, more than 10 percent of the total amount of deposits of insured depository institutions in the United States.

'(B) STATEWIDE CONCENTRATION LIMITS OTHER THAN WITH RESPECT TO INITIAL ENTRIES- The Board may not approve an application pursuant to paragraph (1)(A) if-- '(i) immediately before the consummation of the acquisition for which such application is filed, the applicant (including any insured depository institution affiliate of the applicant) controls any insured depository institution or any branch of an insured depository institution in the home State of any bank to be acquired or in any host State in which any such bank maintains a branch; and

'(ii) the applicant (including all insured depository institutions which are affiliates of the applicant), upon consummation of the acquisition, would control 30 percent or more of the total amount of deposits of insured depository institutions in any such State. '(C) EFFECTIVENESS OF STATE DEPOSIT CAPS- No provision of this subsection shall be construed as affecting the authority of any State to limit, by statute, regulation, or order, the percentage of the total amount of deposits of

insured depository institutions in the State which may be held or controlled by any bank or bank holding company (including all insured depository institutions which are affiliates of the bank or bank holding company) to the extent the application of such limitation does not discriminate against out-of-State banks, out-of-State bank holding companies, or subsidiaries of such banks or holding companies.

'(D) EXCEPTIONS TO SUBPARAGRAPH (B)- The Board may approve an application pursuant to paragraph (1)(A) without regard to the applicability of subparagraph (B) with respect to any State if--

'(i) there is a limitation described in subparagraph (C) in a State statute, regulation, or order which has the effect of permitting a bank or bank holding company (including all insured depository institutions which are affiliates of the bank or bank holding company) to control a greater percentage of total deposits of all insured depository institutions in the State than the percentage permitted under subparagraph (B); or '(ii) the acquisition is approved by the appropriate State bank supervisor of such State and the standard on which such approval is based does not have the effect of discriminating against out-of-State banks, out-of-State bank holding companies, or subsidiaries of such banks or holding companies.

'(E) DEPOSIT DEFINED- For purposes of this paragraph, the term 'deposit'has the same meaning as in section 3(l) of the Federal Deposit Insurance Act.

'(3) COMMUNITY REINVESTMENT COMPLIANCE- In determining whether to approve an application under

paragraph (1)(A), the Board shall--

'(A) comply with the responsibilities of the Board regarding such application under section 804 of the Community Reinvestment Act of 1977; and

'(B) take into account the applicant's record of compliance with applicable State community reinvestment laws.

'(4) APPLICABILITY OF ANTITRUST LAWS- No provision of this subsection shall be construed as affecting--

'(A) the applicability of the antitrust laws; or

'(B) the applicability, if any, of any State law which is similar to the antitrust laws.

'(5) EXCEPTION FOR BANKS IN DEFAULT OR IN DANGER OF DEFAULT- The Board may approve an application pursuant to paragraph (1)(A) which involves--

'(A) an acquisition of 1 or more banks in default or in danger of default; or

'(B) an acquisition with respect to which assistance is provided under section 13(c) of the Federal Deposit Insurance Act;

without regard to subparagraph (B) or (D) of paragraph (1) or paragraph (2) or (3).'.

(b) STATE TAXATION AUTHORITY NOT AFFECTED- Section 7 of the Bank Holding Company Act of 1956 (12

U.S.C. 1846) is amended--

(1) by striking 'No provision'and inserting ' IN GENERAL- No provision'; and

(2) by adding at the end the following new subsection: '(b) STATE TAXATION AUTHORITY NOT AFFECTED- No provision of this Act shall be construed as affecting the authority of any State or political subdivision of any State to adopt, apply, or administer any tax or method of taxation to any bank, bank holding company, or foreign bank, or any affiliate of any bank, bank holding company, or foreign bank, to the extent that such tax or tax method is otherwise permissible by or under the Constitution of the United States or other Federal law.'.

(c) DEFINITIONS- Section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841) is amended by adding at the end the following new subsections:

'(n) INCORPORATED DEFINITIONS- For purposes of this Act, the terms 'insured depository institution', 'appropriate Federal banking agency', 'default', 'in danger of default', and 'State bank supervisor'have the same meanings as in section 3 of the Federal Deposit Insurance Act.

'(o) OTHER DEFINITIONS- For purposes of this Act, the following definitions shall apply:

'(1) ADEQUATELY CAPITALIZED- The term 'adequately capitalized'means a level of capitalization which meets or exceeds all applicable Federal regulatory capital standards. '(2) ANTITRUST LAWS- Except as

provided in section 11, the term 'antitrust laws'--

'(A) has the same meaning as in subsection (a) of the first section of the Clayton Act; and

'(B) includes section 5 of the Federal Trade Commission Act to the extent that such section 5 relates to unfair methods of competition.

'(3) BRANCH- The term 'branch'means a domestic branch (as defined in section 3 of the Federal Deposit Insurance Act). '(4) HOME STATE- The term 'home State'means--

'(A) with respect to a national bank, the State in which the main office of the bank is located;

'(B) with respect to a State bank, the State by which the bank is chartered; and

'(C) with respect to a bank holding company, the State in which the total deposits of all banking subsidiaries of such company are the largest on the later of-- '(i) July 1, 1966; or

'(ii) the date on which the company becomes a bank holding company under this Act.

'(5) HOST STATE- The term 'host State'means--

'(A) with respect to a bank, a State, other than the home State of the bank, in which the bank maintains, or seeks to establish and maintain, a branch; and

'(B) with respect to a bank holding company, a State,

other than the home State of the company, in which the company controls, or seeks to control, a bank subsidiary.
'(6) OUT-OF-STATE BANK- The term 'out-of-State bank'means, with respect to any State, a bank whose home State is another State.

'(7) OUT-OF-STATE BANK HOLDING COMPANY- The term 'out-of-State bank holding company'means, with respect to any State, a bank holding company whose home State is another State.'.

(d) SUBSIDIARY DEPOSITORY INSTITUTIONS AS AGENTS- Section 18 of the Federal Deposit Insurance Act (12 U.S.C. 1828) is amended by adding at the end the following new subsection:

'(r) SUBSIDIARY DEPOSITORY INSTITUTIONS AS AGENTS FOR CERTAIN AFFILIATES-

'(1) IN GENERAL- Any bank subsidiary of a bank holding company may receive deposits, renew time deposits, close loans, service loans, and receive payments on loans and other obligations as an agent for a depository institution affiliate. '(2) BANK ACTING AS AGENT IS NOT A BRANCH- Notwithstanding any other provision of law, a bank acting as an agent in accordance with paragraph (1) for a depository institution affiliate shall not be considered to be a branch of the affiliate.

'(3) PROHIBITIONS ON ACTIVITIES- A depository institution may not--

'(A) conduct any activity as an agent under paragraph (1) or (6) which such institution is prohibited from conducting

as a principal under any applicable Federal or State law; or '(B) as a principal, have an agent conduct any activity under paragraph (1) or (6) which the institution is prohibited from conducting under any applicable Federal or State law.

'(4) EXISTING AUTHORITY NOT AFFECTED- No provision of this subsection shall be construed as affecting--

'(A) the authority of any depository institution to act as an agent on behalf of any other depository institution under any other provision of law; or

'(B) whether a depository institution which conducts any activity as an agent on behalf of any other depository institution under any other provision of law shall be considered to be a branch of such other institution.

'(5) AGENCY RELATIONSHIP REQUIRED TO BE CONSISTENT WITH SAFE AND SOUND BANKING PRACTICES- An agency relationship between depository institutions under paragraph (1) or (6) shall be on terms that are consistent with safe and sound banking practices and all applicable regulations of any appropriate Federal banking agency.

'(6) AFFILIATED INSURED SAVINGS ASSOCIATIONS- An insured savings association which was an affiliate of a bank on July 1, 1994, may conduct activities as an agent on behalf of such bank in the same manner as an insured bank affiliate of such bank may act as agent for such bank under this subsection to the extent such activities are conducted only in--

'(A) any State in which--

'(i) the bank is not prohibited from operating a branch under any provision of Federal or State law; and

'(ii) the savings association maintained an office or branch and conducted business as of July 1, 1994; or

'(B) any State in which--

'(i) the bank is not expressly prohibited from operating a branch under a State law described in section 44(a)(2); and

'(ii) the savings association maintained a main office and conducted business as of July 1, 1994.'. (e) EFFECTIVE DATE- The amendments made by this section shall take effect at the end of the 1-year period beginning on the date of the enactment of this Act.

SEC. 102. INTERSTATE BANK MERGERS.

(a) IN GENERAL- The Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.) is amended by adding at the end the following new section: 'SEC. 44. INTERSTATE BANK MERGERS.

'(a) APPROVAL OF INTERSTATE MERGER TRANSACTIONS AUTHORIZED-

'(1) IN GENERAL- Beginning on June 1, 1997, the responsible agency may approve a merger transaction under section 18(c) between insured banks with different home States, without regard to whether such transaction is prohibited under the law of any State.

'(2) STATE ELECTION TO PROHIBIT INTERSTATE MERGER TRANSACTIONS-

'(A) IN GENERAL- Notwithstanding paragraph (1), a merger transaction may not be approved pursuant to paragraph (1) if the transaction involves a bank the home State of which has enacted a law after the date of enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 and before June 1, 1997, that--

'(i) applies equally to all out-of-State banks; and

'(ii) expressly prohibits merger transactions involving out-of-State banks.

'(B) NO EFFECT ON PRIOR APPROVALS OF MERGER TRANSACTIONS- A law enacted by a State pursuant to subparagraph (A) shall have no effect on merger transactions that were approved before the effective date of such law.

'(3) STATE ELECTION TO PERMIT EARLY INTERSTATE MERGER TRANSACTIONS-

'(A) IN GENERAL- A merger transaction may be approved pursuant to paragraph (1) before June 1, 1997, if the home State of each bank involved in the transaction has in effect, as of the date of the approval of such transaction, a law that--

'(i) applies equally to all out-of-State banks; and

'(ii) expressly permits interstate merger transactions with all

out-of-State banks.

'(B) CERTAIN CONDITIONS ALLOWED- A host State may impose conditions on a branch within such State of a bank resulting from an interstate merger transaction if--

'(i) the conditions do not have the effect of discriminating against out-of-State banks, out-of-State bank holding companies, or any subsidiary of such bank or company (other than on the basis of a nationwide reciprocal treatment requirement);

'(ii) the imposition of the conditions is not preempted by Federal law; and

'(iii) the conditions do not apply or require performance after May 31, 1997.

'(4) INTERSTATE MERGER TRANSACTIONS INVOLVING ACQUISITIONS OF BRANCHES-

'(A) IN GENERAL- An interstate merger transaction may involve the acquisition of a branch of an insured bank without the acquisition of the bank only if the law of the State in which the branch is located permits out-of-State banks to acquire a branch of a bank in such State without acquiring the bank.

'(B) TREATMENT OF BRANCH FOR PURPOSES OF THIS SECTION- In the case of an interstate merger transaction which involves the acquisition of a branch of an insured bank without the acquisition of the bank, the branch shall be treated, for purposes of this section, as an insured bank the home State of which is the State in which the

branch is located.

'(5) PRESERVATION OF STATE AGE LAWS-

'(A) IN GENERAL- The responsible agency may not approve an application pursuant to paragraph (1) that would have the effect of permitting an out-of-State bank or out-of-State bank holding company to acquire a bank in a host State that has not been in existence for the minimum period of time, if any, specified in the statutory law of the host State.

'(B) SPECIAL RULE FOR STATE AGE LAWS SPECIFYING A PERIOD OF MORE THAN 5 YEARS- Notwithstanding subparagraph (A), the responsible agency may approve a merger transaction pursuant to paragraph (1) involving the acquisition of a bank that has been in existence at least 5 years without regard to any longer minimum period of time specified in a statutory law of the host State.

'(6) SHELL BANKS- For purposes of this subsection, a bank that has been chartered solely for the purpose of, and does not open for business prior to, acquiring control of, or acquiring all or substantially all of the assets of, an existing bank or branch shall be deemed to have been in existence for the same period of time as the bank or branch to be acquired.

'(b) PROVISIONS RELATING TO APPLICATION AND APPROVAL PROCESS-

'(1) COMPLIANCE WITH STATE FILING REQUIREMENTS-

'(A) IN GENERAL- Any bank which files an application for an interstate merger transaction shall--

'(i) comply with the filing requirements of any host State of the bank which will result from such transaction to the extent that the requirement--

'(I) does not have the effect of discriminating against out-of-State banks or out-of-State bank holding companies or subsidiaries of such banks or bank holding companies; and

'(II) is similar in effect to any requirement imposed by the host State on a nonbanking corporation incorporated in another State that engages in business in the host State; and

'(ii) submit a copy of the application to the State bank supervisor of the host State.

'(B) PENALTY FOR FAILURE TO COMPLY- The responsible agency may not approve an application for an interstate merger transaction if the applicant materially fails to comply with subparagraph (A).

'(2) CONCENTRATION LIMITS-

'(A) NATIONWIDE CONCENTRATION LIMITS- The responsible agency may not approve an application for an interstate merger transaction if the resulting bank (including all insured depository institutions which are affiliates of the resulting bank), upon consummation of the transaction, would control more than 10 percent of the total amount of deposits of insured depository institutions in the United States.

'(B) STATEWIDE CONCENTRATION LIMITS OTHER THAN WITH RESPECT TO INITIAL ENTRIES- The responsible agency may not approve an application for an interstate merger transaction if--

'(i) any bank involved in the transaction (including all insured depository institutions which are affiliates of any such bank) has a branch in any State in which any other bank involved in the transaction has a branch; and

'(ii) the resulting bank (including all insured depository institutions which would be affiliates of the resulting bank), upon consummation of the transaction, would control 30 percent or more of the total amount of deposits of insured depository institutions in any such State.

'(C) EFFECTIVENESS OF STATE DEPOSIT CAPS- No provision of this subsection shall be construed as affecting the authority of any State to limit, by statute, regulation, or order, the percentage of the total amount of deposits of insured depository institutions in the State which may be held or controlled by any bank or bank holding company (including all insured depository institutions which are affiliates of the bank or bank holding company) to the extent the application of such limitation does not discriminate against out-of-State banks, out-of-State bank holding companies, or subsidiaries of such banks or holding companies.

'(D) EXCEPTIONS TO SUBPARAGRAPH (B)- The responsible agency may approve an application for an interstate merger transaction pursuant to subsection (a) without regard to the applicability of subparagraph (B) with respect to any State if--

'(i) there is a limitation described in subparagraph (C) in a State statute, regulation, or order which has the effect of permitting a bank or bank holding company (including all insured depository institutions which are affiliates of the bank or bank holding company) to control a greater percentage of total deposits of all insured depository institutions in the State than the percentage permitted under subparagraph (B); or

'(ii) the transaction is approved by the appropriate State bank supervisor of such State and the standard on which such approval is based does not have the effect of discriminating against out-of-State banks, out-of-State bank holding companies, or subsidiaries of such banks or holding companies.

'(E) EXCEPTION FOR CERTAIN BANKS- This paragraph shall not apply with respect to any interstate merger transaction involving only affiliated banks.

'(3) COMMUNITY REINVESTMENT COMPLIANCE- In determining whether to approve an application for an interstate merger transaction in which the resulting bank would have a branch or bank affiliate immediately following the transaction in any State in which the bank submitting the application (as the acquiring bank) had no branch or bank affiliate immediately before the transaction, the responsible agency shall--

'(A) comply with the responsibilities of the agency regarding such application under section 804 of the Community Reinvestment Act of 1977;

'(B) take into account the most recent written evaluation

under section 804 of the Community Reinvestment Act of 1977 of any bank which would be an affiliate of the resulting bank; and

'(C) take into account the record of compliance of any applicant bank with applicable State community reinvestment laws.

'(4) ADEQUACY OF CAPITAL AND MANAGEMENT SKILLS- The responsible agency may approve an application for an interstate merger transaction pursuant to subsection (a) only if--

'(A) each bank involved in the transaction is adequately capitalized as of the date the application is filed; and

'(B) the responsible agency determines that the resulting bank will continue to be adequately capitalized and adequately managed upon the consummation of the transaction.

'(5) SURRENDER OF CHARTER AFTER MERGER TRANSACTION- The charters of all banks involved in an interstate merger transaction, other than the charter of the resulting bank, shall be surrendered, upon request, to the Federal banking agency or State bank supervisor which issued the charter.

'(c) APPLICABILITY OF CERTAIN LAWS TO INTERSTATE BANKING OPERATIONS-

'(1) STATE TAXATION AUTHORITY NOT AFFECTED-

'(A) IN GENERAL- No provision of this section shall be construed as affecting the authority of any State or political subdivision of any State to adopt, apply, or administer any tax or method of taxation to any bank, bank holding company, or foreign bank, or any affiliate of any bank, bank holding company, or foreign bank, to the extent such tax or tax method is otherwise permissible by or under the Constitution of the United States or other Federal law.

'(B) IMPOSITION OF SHARES TAX BY HOST STATES- In the case of a branch of an out-of-State bank which results from an interstate merger transaction, a proportionate amount of the value of the shares of the out-of-State bank may be subject to any bank shares tax levied or imposed by the host State, or any political subdivision of such host State that imposes such tax based upon a method adopted by the host State, which may include allocation and apportionment.

'(2) APPLICABILITY OF ANTITRUST LAWS- No provision of this section shall be construed as affecting--

'(A) the applicability of the antitrust laws; or

'(B) the applicability, if any, of any State law which is similar to the antitrust laws.

'(3) RESERVATION OF CERTAIN RIGHTS TO STATES- No provision of this section shall be construed as limiting in any way the right of a State to--

'(A) determine the authority of State banks chartered by that State to establish and maintain branches; or

'(B) supervise, regulate, and examine State banks chartered by that State.

'(4) STATE-IMPOSED NOTICE REQUIREMENTS- A host State may impose any notification or reporting requirement on a branch of an out-of-State bank if the requirement--

'(A) does not discriminate against out-of-State banks or bank holding companies; and

'(B) is not preempted by any Federal law regarding the same subject.

'(d) OPERATIONS OF THE RESULTING BANK-

'(1) CONTINUED OPERATIONS- A resulting bank may, subject to the approval of the appropriate Federal banking agency, retain and operate, as a main office or a branch, any office that any bank involved in an interstate merger transaction was operating as a main office or a branch immediately before the merger transaction.

'(2) ADDITIONAL BRANCHES- Following the consummation of any interstate merger transaction, the resulting bank may establish, acquire, or operate additional branches at any location where any bank involved in the transaction could have established, acquired, or operated a branch under applicable Federal or State law if such bank had not been a party to the merger transaction.

'(3) CERTAIN CONDITIONS AND COMMITMENTS CONTINUED- If, as a condition for the acquisition of a bank by an out-of-State bank holding company before the

date of the enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994--

'(A) the home State of the acquired bank imposed conditions on such acquisition by such out-of-State bank holding company; or

'(B) the bank holding company made commitments to such State in connection with the acquisition, the State may enforce such conditions and commitments with respect to such bank holding company or any affiliated successor company which controls a bank or branch in such State as a result of an interstate merger transaction to the same extent as the State could enforce such conditions or commitments against the bank holding company before the consummation of the merger transaction.

'(e) EXCEPTION FOR BANKS IN DEFAULT OR IN DANGER OF DEFAULT- If an application under subsection (a)(1) for approval of a merger transaction which involves 1 or more banks in default or in danger of default or with respect to which the Corporation provides assistance under section 13(c), the responsible agency may approve such application without regard to subsection (b), or paragraph (2), (4), or (5) of subsection (a).

'(f) DEFINITIONS- For purposes of this section, the following definitions shall apply:

'(1) ADEQUATELY CAPITALIZED- The term 'adequately capitalized'has the same meaning as in section 38.

'(2) ANTITRUST LAWS- The term 'antitrust laws'--

'(A) has the same meaning as in subsection (a) of the first section of the Clayton Act; and

'(B) includes section 5 of the Federal Trade Commission Act to the extent such section 5 relates to unfair methods of competition.

'(3) BRANCH- The term 'branch'means any domestic branch.

'(4) HOME STATE- The term 'home State'--

'(A) means--

'(i) with respect to a national bank, the State in which the main office of the bank is located; and

'(ii) with respect to a State bank, the State by which the bank is chartered; and

'(B) with respect to a bank holding company, has the same meaning as in section 2(o)(4) of the Bank Holding Company Act of 1956.

'(5) HOST STATE- The term 'host State'means, with respect to a bank, a State, other than the home State of the bank, in which the bank maintains, or seeks to establish and maintain, a branch.

'(6) INTERSTATE MERGER TRANSACTION- The term 'interstate merger transaction'means any merger transaction approved pursuant to subsection (a)(1).

'(7) MERGER TRANSACTION- The term 'merger

transaction'has the meaning determined under section 18(c)(3).

'(8) OUT-OF-STATE BANK- The term 'out-of-State bank'means, with respect to any State, a bank whose home State is another State.

'(9) OUT-OF-STATE BANK HOLDING COMPANY- The term 'out-of-State bank holding company'means, with respect to any State, a bank holding company whose home State is another State.

'(10) RESPONSIBLE AGENCY- The term 'responsible agency'means the agency determined in accordance with section 18(c)(2) with respect to a merger transaction.

'(11) RESULTING BANK- The term 'resulting bank'means a bank that has resulted from an interstate merger transaction under this section.'.

(b) TECHNICAL AND CONFORMING AMENDMENTS-

(1) REVISED STATUTES- Section 5155 of the Revised Statutes (12 U.S.C. 36) is amended--

(A) by redesignating subsections (d) through (h) as subsections (h) through (l), respectively; and (B) by inserting after subsection (c) the following new subsections:

'(d) BRANCHES RESULTING FROM INTERSTATE MERGER TRANSACTIONS- A national bank resulting from an interstate merger transaction (as defined in section 44(f)(6) of the Federal Deposit Insurance Act) may

maintain and operate a branch in a State other than the home State (as defined in subsection (g)(3)(B)) of such bank in accordance with section 44 of the Federal Deposit Insurance Act.

'(e) EXCLUSIVE AUTHORITY FOR ADDITIONAL BRANCHES-

'(1) IN GENERAL- Effective June 1, 1997, a national bank may not acquire, establish, or operate a branch in any State other than the bank's home State (as defined in subsection (g)(3)(B)) or a State in which the bank already has a branch unless the acquisition, establishment, or operation of such branch in such State by such national bank is authorized under this section or section 13(f), 13(k), or 44 of the Federal Deposit Insurance Act.

'(2) RETENTION OF BRANCHES- In the case of a national bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State which was the bank's home State (as defined in subsection (g)(3)(B)) before the relocation of such office only to the extent the bank would be authorized, under this section or any other provision of law referred to in paragraph (1), to acquire, establish, or commence to operate a branch in such State if--

'(A) the bank had no branches in such State; or

'(B) the branch resulted from--

'(i) an interstate merger transaction approved pursuant to section 44 of the Federal Deposit Insurance Act; or

'(ii) a transaction after May 31, 1997, pursuant to which the bank received assistance from the Federal Deposit Insurance Corporation under section 13(c) of such Act.

'(f) LAW APPLICABLE TO INTERSTATE BRANCHING OPERATIONS-

'(1) LAW APPLICABLE TO NATIONAL BANK BRANCHES-

'(A) IN GENERAL- The laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State, except--

'(i) when Federal law preempts the application of such State laws to a national bank; or

'(ii) when the Comptroller of the Currency determines that the application of such State laws would have a discriminatory effect on the branch in comparison with the effect the application of such State laws would have with respect to branches of a bank chartered by the host State.

'(B) ENFORCEMENT OF APPLICABLE STATE LAWS- The provisions of any State law to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the Comptroller of the Currency.

'(2) TREATMENT OF BRANCH AS BANK- All laws of a host State, other than the laws regarding community

reinvestment, consumer protection, fair lending, establishment of intrastate branches, and the application or administration of any tax or method of taxation, shall apply to a branch (in such State) of an out-of-State national bank to the same extent as such laws would apply if the branch were a national bank the main office of which is in such State.

'(3) RULE OF CONSTRUCTION- No provision of this subsection may be construed as affecting the legal standards for preemption of the application of State law to national banks.'. (2) ACT OF MAY 1, 1886- Section 2 of the Act entitled 'An Act to enable national banking associations to increase their capital stock and to change their names and locations.'and approved May 1, 1886 (12 U.S.C. 30) is amended by adding at the end the following new subsection:

'(c) COORDINATION WITH REVISED STATUTES- In the case of a national bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State from which the bank relocated such office only to the extent authorized in section 5155(e)(2) of the Revised Statutes.'.

(3) FEDERAL DEPOSIT INSURANCE ACT-

(A) EXCLUSIVE AUTHORITY FOR ADDITIONAL BRANCHES OF STATE NONMEMBER BANKS- Section 18(d) of the Federal Deposit Insurance Act (12 U.S.C. 1828(d)) is amended by adding at the end the following new paragraph:

'(3) EXCLUSIVE AUTHORITY FOR ADDITIONAL BRANCHES-

'(A) IN GENERAL- Effective June 1, 1997, a State nonmember bank may not acquire, establish, or operate a branch in any State other than the bank's home State (as defined in section 44(f)(4)) or a State in which the bank already has a branch unless the acquisition, establishment, or operation of a branch in such State by a State nonmember bank is authorized under this subsection or section 13(f), 13(k), or 44.

'(B) RETENTION OF BRANCHES- In the case of a State nonmember bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State which was the bank's home State (as defined in section 44(f)(4)) before the relocation of such office only to the extent the bank would be authorized, under this section or any other provision of law referred to in subparagraph (A), to acquire, establish, or commence to operate a branch in such State if--

'(i) the bank had no branches in such State; or

'(ii) the branch resulted from--

'(I) an interstate merger transaction approved pursuant to section 44; or

'(II) a transaction after May 31, 1997, pursuant to which the bank received assistance from the Corporation under section 13(c).'. (B) ACTIVITIES OF BRANCHES OF STATE BANKS RESULTING FROM INTERSTATE

MERGER TRANSACTIONS- Section 24 of the Federal Deposit Insurance Act (12 U.S.C. 1831a) is amended by adding at the end the following new subsection:

'(j) ACTIVITIES OF BRANCHES OF OUT-OF-STATE BANKS-

'(1) IN GENERAL- The laws of a host State, including laws regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches, shall apply to any branch in the host State of an out-of-State State bank to the same extent as such State laws apply to a branch of a bank chartered by that State.

'(2) ACTIVITIES OF BRANCHES- An insured State bank that establishes a branch in a host State may not conduct any activity at such branch that is not permissible for a bank chartered by the host State.

'(3) DEFINITIONS- The terms 'host State', 'interstate merger transaction', and 'out-of-State bank'have the same meanings as in section 44(f).'.

(4) ACT OF NOVEMBER 7, 1918- The Act entitled 'An Act to provide for the consolidation of the national banking associations.'and approved November 7, 1918 (12 U.S.C. 215 et seq.) is amended--

(A) by redesignating section 2 as section 3; (B) by redesignating section 3 as section 5; (C) in the 1st section, by striking 'That (a) any national banking association'and inserting the following: 'SECTION 1. SHORT TITLE.

'This Act may be cited as the 'National Bank

Consolidation and Merger Act'.

'SEC. 2. CONSOLIDATION OF BANKS WITHIN THE SAME STATE.

'(a) IN GENERAL- Any national bank'; and

(D) by inserting after section 3 (as so redesignated under subparagraph (A) of this paragraph) the following new section:

'SEC. 4. INTERSTATE CONSOLIDATIONS AND MERGERS.

'(a) IN GENERAL- A national bank may engage in a consolidation or merger under this Act with an out-of-State bank if the consolidation or merger is approved pursuant to section 44 of the Federal Deposit Insurance Act.

'(b) SCOPE OF APPLICATION- Subsection (a) shall not apply with respect to any consolidation or merger before June 1, 1997, unless the home State of each bank involved in the transaction has in effect a law described in section 44(a)(3) of the Federal Deposit Insurance Act.

'(c) DEFINITIONS- The terms 'home State'and 'out-of-State bank'have the same meaning as in section 44(f) of the Federal Deposit Insurance Act.'.

(5) HOME OWNERS'LOAN ACT- Section 3 of the Home Owners'Loan Act (12 U.S.C. 1462a) is amended--

(A) by redesignating subsections (f) through (i) as subsections (g) through (j), respectively; and (B) by

inserting after subsection (e), the following new subsection:

'(f) STATE HOMESTEAD PROVISIONS- No provision of this Act or any other provision of law administered by the Director shall be construed as superseding any homestead provision of any State constitution, including any implementing State statute, in effect on the date of enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, or any subsequent amendment to such a State constitutional or statutory provision in effect on such date, that exempts the homestead of any person from foreclosure, or forced sale, for the payment of all debts, other than a purchase money obligation relating to the homestead, taxes due on the homestead, or an obligation arising from work and material used in constructing improvements on the homestead.'. (a) NATIONAL BANKS- Section 5155 of the Revised Statutes (12 U.S.C. 36) is amended by inserting after subsection (f) (as added by section 102(b)) the following new subsection:

'(g) STATE 'OPT-IN'ELECTION TO PERMIT INTERSTATE BRANCHING THROUGH DE NOVO BRANCHES-

'(1) IN GENERAL- Subject to paragraph (2), the Comptroller of the Currency may approve an application by a national bank to establish and operate a de novo branch in a State (other than the bank's home State) in which the bank does not maintain a branch if--

'(A) there is in effect in the host State a law that--

'(i) applies equally to all banks; and

'(ii) expressly permits all out-of-State banks to establish de novo branches in such State; and

'(B) the conditions established in, or made applicable to this paragraph by, paragraph (2) are met.

'(2) CONDITIONS ON ESTABLISHMENT AND OPERATION OF INTERSTATE BRANCH-

'(A) ESTABLISHMENT- An application by a national bank to establish and operate a de novo branch in a host State shall be subject to the same requirements and conditions to which an application for an interstate merger transaction is subject under paragraphs (1), (3), and (4) of section 44(b) of the Federal Deposit Insurance Act.

'(B) OPERATION- Subsections (c) and (d)(2) of section 44 of the Federal Deposit Insurance Act shall apply with respect to each branch of a national bank which is established and operated pursuant to an application approved under this subsection in the same manner and to the same extent such provisions of such section 44 apply to a branch of a national bank which resulted from an interstate merger transaction approved pursuant to such section 44.

'(3) DEFINITIONS- The following definitions shall apply for purposes of this section:

'(A) DE NOVO BRANCH- The term 'de novo branch'means a branch of a national bank which--

'(i) is originally established by the national bank as a branch; and

'(ii) does not become a branch of such bank as a result of--

'(I) the acquisition by the bank of an insured depository institution or a branch of an insured depository institution; or

'(II) the conversion, merger, or consolidation of any such institution or branch.

'(B) HOME STATE- The term 'home State'means the State in which the main office of a national bank is located.

'(C) HOST STATE- The term 'host State'means, with respect to a bank, a State, other than the home State of the bank, in which the bank maintains, or seeks to establish and maintain, a branch.'.

(b) STATE BANKS- Section 18(d) of the Federal Deposit Insurance Act (12 U.S.C. 1828(d)) is amended by inserting after paragraph (3) (as added by section 102(b)(3) of this title) the following new paragraph:

'(4) STATE 'OPT-IN'ELECTION TO PERMIT INTERSTATE BRANCHING THROUGH DE NOVO BRANCHES-

'(A) IN GENERAL- Subject to subparagraph (B), the Corporation may approve an application by an insured State nonmember bank to establish and operate a de novo branch in a State (other than the bank's home State) in which the bank does not maintain a branch if--

'(i) there is in effect in the host State a law that--

'(I) applies equally to all banks; and

'(II) expressly permits all out-of-State banks to establish de novo branches in such State; and

'(ii) the conditions established in, or made applicable to this paragraph by, subparagraph (B) are met.

'(B) CONDITIONS ON ESTABLISHMENT AND OPERATION OF INTERSTATE BRANCH-

'(i) ESTABLISHMENT- An application by an insured State nonmember bank to establish and operate a de novo branch in a host State shall be subject to the same requirements and conditions to which an application for a merger transaction is subject under paragraphs (1), (3), and (4) of section 44(b).

'(ii) OPERATION- Subsections (c) and (d)(2) of section 44 shall apply with respect to each branch of an insured State nonmember bank which is established and operated pursuant to an application approved under this paragraph in the same manner and to the same extent such provisions of such section apply to a branch of a State bank which resulted from a merger transaction under such section 44.

'(C) DE NOVO BRANCH DEFINED- For purposes of this paragraph, the term 'de novo branch'means a branch of a State bank which--

'(i) is originally established by the State bank as a branch; and

'(ii) does not become a branch of such bank as a result of--

'(I) the acquisition by the bank of an insured depository institution or a branch of an insured depository institution; or

'(II) the conversion, merger, or consolidation of any such institution or branch.

'(D) HOME STATE DEFINED- The term 'home State'means the State by which a State bank is chartered.

'(E) HOST STATE DEFINED- The term 'host State'means, with respect to a bank, a State, other than the home State of the bank, in which the bank maintains, or seeks to establish and maintain, a branch.'.

SEC. 104. BRANCHING BY FOREIGN BANKS.

(a) IN GENERAL- Section 5(a) of the International Banking Act of 1978 (12 U.S.C. 3103(a)) is amended to read as follows:

'(a) INTERSTATE BRANCHING AND AGENCY OPERATIONS-

'(1) FEDERAL BRANCH OR AGENCY- Subject to the provisions of this Act and with the prior written approval by the Board and the Comptroller of the Currency of an application, a foreign bank may establish and operate a Federal branch or agency in any State outside the home State of such foreign bank to the extent that the establishment and operation of such branch would be

permitted under section 5155(g) of the Revised Statutes or section 44 of the Federal Deposit Insurance Act if the foreign bank were a national bank whose home State is the same State as the home State of the foreign bank.

'(2) STATE BRANCH OR AGENCY- Subject to the provisions of this Act and with the prior written approval by the Board and the appropriate State bank supervisor of an application, a foreign bank may establish and operate a State branch or agency in any State outside the home State of such foreign bank to the extent that such establishment and operation would be permitted under section 18(d)(4) or 44 of the Federal Deposit Insurance Act if the foreign bank were a State bank whose home State is the same State as the home State of the foreign bank.

'(3) CRITERIA FOR DETERMINATION- In approving an application under paragraph (1) or (2), the Board and (in the case of an application under paragraph (1)) the Comptroller of the Currency--

'(A) shall apply the standards applicable to the establishment of a foreign bank office in the United States under section 7(d);

'(B) may not approve an application unless the Board and (in the case of an application under paragraph (1)) the Comptroller of the Currency--

'(i) determine that the foreign bank's financial resources, including the capital level of the bank, are equivalent to those required for a domestic bank to be approved for branching under section 5155 of the Revised Statutes and section 44 of the Federal Deposit Insurance Act; and

'(ii) consult with the Secretary of the Treasury regarding capital equivalency; and

'(C) shall apply the same requirements and conditions to which an application for an interstate merger transaction is subject under paragraphs (1), (3), and (4) of section 44(b) of the Federal Deposit Insurance Act.

'(4) OPERATION- Subsections (c) and (d)(2) of section 44 of the Federal Deposit Insurance Act shall apply with respect to each branch and agency of a foreign bank which is established and operated pursuant to an application approved under this subsection in the same manner and to the same extent such provisions of such section apply to a domestic branch of a national or State bank (as such terms are defined in section 3 of such Act) which resulted from a merger transaction under such section 44.

'(5) EXCLUSIVE AUTHORITY FOR ADDITIONAL BRANCHES- Except as provided in this section, a foreign bank may not, directly or indirectly, acquire, establish, or operate a branch or agency in any State other than the home State of such bank.

'(6) REQUIREMENT FOR A SEPARATE SUBSIDIARY- If the Board or the Comptroller of the Currency, taking into account differing regulatory or accounting standards, finds that adherence by a foreign bank to capital requirements equivalent to those imposed under section 5155 of the Revised Statutes and section 44 of the Federal Deposit Insurance Act could be verified only if the banking activities of such bank in the United States are carried out in a domestic banking subsidiary within the United States, the Board and (in the case of an application under

paragraph (1)) the Comptroller of the Currency may approve an application under paragraph (1) or (2) subject to a requirement that the foreign bank or company controlling the foreign bank establish a domestic banking subsidiary in the United States.

'(7) ADDITIONAL AUTHORITY FOR INTERSTATE BRANCHES AND AGENCIES OF FOREIGN BANKS- Notwithstanding paragraphs (1) and (2), a foreign bank may, with the approval of the Board and the Comptroller of the Currency, establish and operate a Federal branch or Federal agency or, with the approval of the Board and the appropriate State bank supervisor, a State branch or State agency in any State outside the foreign bank's home State if--

'(A) the establishment and operation of a branch or agency is expressly permitted by the State in which the branch or agency is to be established; and

'(B) in the case of a Federal or State branch, the branch receives only such deposits as would be permissible for a corporation organized under section 25A of the Federal Reserve Act.

'(9) HOME STATE OF DOMESTIC BANK DEFINED- For purposes of this subsection, the term 'home State'means--

'(A) with respect to a national bank, the State in which the main office of the bank is located; and

'(B) with respect to a State bank, the State by which the bank is chartered.'.

(b) CONTINUED AUTHORITY FOR LIMITED BRANCHES, AGENCIES, OR COMMERCIAL LENDING COMPANIES- Section 5(b) of the International Banking Act of 1978 (12 U.S.C. 3103(b)) is amended by adding at the end the following new sentence: 'Notwithstanding subsection (a), a foreign bank may continue to operate, after the enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, any Federal branch, State branch, Federal agency, State agency, or commercial lending company subsidiary which such bank was operating on the day before the date of the enactment of such Act to the extent the branch, agency, or subsidiary continues, after the enactment of such Act, to engage in operations which were lawful under the laws in effect on the day before such date.'. (c) CLARIFICATION OF BRANCHING RULES IN THE CASE OF A FOREIGN BANK WITH A DOMESTIC BANK SUBSIDIARY- Section 5 of the International Banking Act of 1978 (12 U.S.C. 3103) is amended by adding at the end the following new subsection:

'(d) CLARIFICATION OF BRANCHING RULES IN THE CASE OF A FOREIGN BANK WITH A DOMESTIC BANK SUBSIDIARY- In the case of a foreign bank that has a domestic bank subsidiary within the United States--

'(1) the fact that such bank controls a domestic bank shall not affect the authority of the foreign bank to establish Federal and State branches or agencies to the extent permitted under subsection (a); and

'(2) the fact that the domestic bank is controlled by a foreign bank which has Federal or State branches or agencies in States other than the home State of such domestic bank shall not affect the authority of the domestic

bank to establish branches outside the home State of the domestic bank to the extent permitted under section 5155(g) of the Revised Statutes or section 18(d)(4) or 44 of the Federal Deposit Insurance Act, as the case may be.'.

(d) HOME STATE DETERMINATIONS- Section 5(c) of the International Banking Act of 1978 (12 U.S.C. 3103(c)) is amended to read as follows:

'(c) DETERMINATION OF HOME STATE OF FOREIGN BANK- For the purposes of this section--

'(1) in the case of a foreign bank that has any branch, agency, subsidiary commercial lending company, or subsidiary bank in more than 1 State, the home State of the foreign bank is the 1 State of such States which is selected to be the home State by the foreign bank or, in default of any such selection, by the Board; and

'(2) in the case of a foreign bank that does not have a branch, agency, subsidiary commercial lending company, or subsidiary bank in more than 1 State, the home State of the foreign bank is the State in which the foreign bank has a branch, agency, subsidiary commercial lending company, or subsidiary bank.'.

SEC. 105. COORDINATION OF EXAMINATION AUTHORITY. Section 10 of the Federal Deposit Insurance Act (12 U.S.C. 1820) is amended by inserting after subsection (g) the following new subsection:

'(h) COORDINATION OF EXAMINATION AUTHORITY-

'(1) IN GENERAL- The appropriate State bank supervisor of a host State may examine a branch operated in such State by an out-of-State insured State bank that resulted from an interstate merger transaction approved under section 44 or a branch established in such State pursuant to section 5155(g) of the Revised Statutes or section 18(d)(4)--

'(A) for the purpose of determining compliance with host State laws, including those that govern banking, community reinvestment, fair lending, consumer protection, and permissible activities; and

'(B) to ensure that the activities of the branch are not conducted in an unsafe or unsound manner.

'(2) ENFORCEMENT- If the State bank supervisor of a host State determines that there is a violation of the law of the host State concerning the activities being conducted by a branch described in paragraph (1) or that the branch is being operated in an unsafe and unsound manner, the State bank supervisor of the host State or, to the extent authorized by the law of the host State, a State law enforcement officer may undertake such enforcement actions and proceedings as would be permitted under the law of the host State as if the branch were a bank chartered by that host State.

'(3) COOPERATIVE AGREEMENT- The State bank supervisors from 2 or more States may enter into cooperative agreements to facilitate State regulatory supervision of State banks, including cooperative agreements relating to the coordination of examinations and joint participation in examinations.

'(4) FEDERAL REGULATORY AUTHORITY- No provision of this subsection shall be construed as limiting in any way the authority of an appropriate Federal banking agency to examine or to take any enforcement actions or proceedings against any bank or branch of a bank for which the agency is the appropriate Federal banking agency.'.

SEC. 106. BRANCH CLOSURES.

Section 42 of the Federal Deposit Insurance Act (12 U.S.C. 1831r-1) is amended by adding at the end the following new subsection:

'(d) BRANCH CLOSURES IN INTERSTATE BANKING OR BRANCHING OPERATIONS-

'(1) NOTICE REQUIREMENTS- In the case of an interstate bank which proposes to close any branch in a low- or moderate-income area, the notice required under subsection (b)(2) shall contain the mailing address of the appropriate Federal banking agency and a statement that comments on the proposed closing of such branch may be mailed to such agency.

'(2) ACTION REQUIRED BY APPROPRIATE FEDERAL BANKING AGENCY- If, in the case of a branch referred to in paragraph (1)--

'(A) a person from the area in which such branch is located--

'(i) submits a written request relating to the closing of such branch to the appropriate Federal banking agency; and

'(ii) includes a statement of specific reasons for the request, including a discussion of the adverse effect of such closing on the availability of banking services in the area affected by the closing of the branch; and

'(B) the agency concludes that the request is not frivolous,

the agency shall consult with community leaders in the affected area and convene a meeting of representatives of the agency and other interested depository institution regulatory agencies with community leaders in the affected area and such other individuals, organizations, and depository institutions (as defined in section 19(b)(1)(A) of the Federal Reserve Act) as the agency may determine, in the discretion of the agency, to be appropriate, to explore the feasibility of obtaining adequate alternative facilities and services for the affected area, including the establishment of a new branch by another depository institution, the chartering of a new depository institution, or the establishment of a community development credit union, following the closing of the branch.

'(3) NO EFFECT ON CLOSING- No action by the appropriate Federal banking agency under paragraph (2) shall affect the authority of an interstate bank to close a branch (including the timing of such closing) if the requirements of subsections (a) and (b) have been met by such bank with respect to the branch being closed.

'(4) DEFINITIONS- For purposes of this subsection, the following definitions shall apply:

'(A) INTERSTATE BANK DEFINED- The term 'interstate bank'means a bank which maintains branches in

more than 1 State.

'(B) LOW- OR MODERATE-INCOME AREA- The term 'low- or moderate-income area'means a census tract for which the median family income is--

'(i) less than 80 percent of the median family income for the metropolitan statistical area (as designated by the Director of the Office of Management and Budget) in which the census tract is located; or

'(ii) in the case of a census tract which is not located in a metropolitan statistical area, less than 80 percent of the median family income for the State in which the census tract is located, as determined without taking into account family income in metropolitan statistical areas in such State.'. SEC. 107. EQUALIZING COMPETITIVE OPPORTUNITIES FOR UNITED STATES AND FOREIGN BANKS.

(a) REGULATORY OBJECTIVES- Section 6 of the International Banking Act of 1978 (12 U.S.C. 3104) is amended--

(1) by redesignating subsections (a) through (c) as subsections (b) through (d), respectively; and (2) by inserting after 'sec. 6'the following new subsection:

'(a) OBJECTIVE- In implementing this section, the Comptroller and the Federal Deposit Insurance Corporation shall each, by affording equal competitive opportunities to foreign and United States banking organizations in their United States operations, ensure that foreign banking organizations do not receive an unfair competitive

advantage over United States banking organizations.'. (b) REVIEW OF REGULATIONS-

(1) IN GENERAL- Each Federal banking agency, after consultation with the other Federal banking agencies to assure uniformity, shall revise the regulations adopted by such agency under section 6 of the International Banking Act of 1978 to ensure that the regulations are consistent with the objective set forth in section 6(a) of the International Banking Act of 1978.

(2) SPECIFIC FACTORS- In carrying out paragraph (1), each Federal banking agency shall consider whether to permit an uninsured branch of a foreign bank to accept initial deposits of less than $100,000 only from--

(A) individuals who are not citizens or residents of the United States at the time of the initial deposit; (B) individuals who--

(i) are not citizens of the United States; (ii) are residents of the United States; and (iii) are employed by a foreign bank, foreign business, foreign government, or recognized international organization;

(C) persons to whom the branch or foreign bank has extended credit or provided other nondeposit banking services;

(D) foreign businesses and large United States businesses; (E) foreign governmental units and recognized international organizations; and

(F) persons who are depositing funds in connection with

the issuance of a financial instrument by the branch for the transmission of funds.

(3) REDUCTION IN REGULATORY DE MINIMIS EXEMPTION- In carrying out paragraph (1), each Federal banking agency shall limit any exemption which is--

(A) available under any regulation prescribed pursuant to section 6(d) of the International Banking Act of 1978 providing for the acceptance of initial deposits of less than $100,000 by an uninsured branch of a foreign bank; and
(B) based on a percentage of the average deposits at such branch;

to not more than 1 percent of the average deposits at such branch.

(4) ADDITIONAL RELEVANT CONSIDERATIONS- In carrying out paragraph (1), each Federal banking agency shall also consider the importance of maintaining and improving the availability of credit to all sectors of the United States economy, including the international trade finance sector of the United State economy.

(5) DEADLINE FOR PRESCRIBING REVISED REGULATIONS- Each Federal banking agency--

(A) shall publish final regulations under paragraph (1) in the Federal Register not later than 12 months after the date of enactment of this Act; and

(B) may establish reasonable transition rules to facilitate any termination of any deposit-taking activities that were permissible under regulations that were in effect before the

date of enactment of this Act. (6) DEFINITIONS- For purposes of this subsection-- (A) the term 'Federal banking agency'means-- (i) the Comptroller of the Currency with respect to Federal branches of foreign banks; and (ii) the Federal Deposit Insurance Corporation with respect to State branches of foreign banks; and (B) the term 'uninsured branch'means a branch of a foreign bank that is not an insured branch, as defined in section 3(s)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)(3)).

(c) AMENDMENT AFFIRMING THAT CONSUMER PROTECTION LAWS APPLY TO FOREIGN BANKS- Section 9(b) of the International Banking Act of 1978 (12 U.S.C. 3106a) is amended--

(1) in paragraph (1)--

(A) by redesignating subparagraphs (A) and (B) as subparagraphs (B) and (C), respectively; and (B) by inserting after 'which--'the following new subparagraph:

'(A) impose requirements that protect the rights of consumers in financial transactions, to the extent that the branch, agency, or commercial lending company engages in activities that are subject to such laws;'; and (2) in paragraph (2)--

(A) by redesignating subparagraphs (A) and (B) as subparagraphs (B) and (C), respectively; and (B) by inserting after 'which--'the following new subparagraph:

'(A) impose requirements that protect the rights of consumers in financial transactions, to the extent that the branch, agency, or commercial lending company engages in

activities that are subject to such laws;'.

(d) INSURED BANKS IN TERRITORIES NOT TREATED AS FOREIGN BANKS FOR PURPOSES OF RETAIL DEPOSIT-TAKING RULE- Section 6(d) of the International Banking Act of 1978 (12 U.S.C. 3104(c)) (as so redesignated by subsection (a)(1) of this section) is amended by adding at the end the following new paragraph:

'(3) INSURED BANKS IN U.S. TERRITORIES- For purposes of this subsection, the term 'foreign bank'does not include any bank organized under the laws of any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands the deposits of which are insured by the Federal Deposit Insurance Corporation pursuant to the Federal Deposit Insurance Act.'. (e) AMENDMENT RELATING TO SHELL BRANCHES-

(1) IN GENERAL- Section 7 of the International Banking Act of 1978 (12 U.S.C. 3105) is amended by adding at the end the following new subsection:

'(k) MANAGEMENT OF SHELL BRANCHES-

'(1) TRANSACTIONS PROHIBITED- A branch or agency of a foreign bank shall not manage, through an office of the foreign bank which is located outside the United States and is managed or controlled by such branch or agency, any type of activity that a bank organized under the laws of the United States, any State, or the District of Columbia is not permitted to manage at any branch or subsidiary of such bank which is located outside the United States.

'(2) REGULATIONS- Any regulations promulgated to carry out this section--

'(A) shall be promulgated in accordance with section 13; and

'(B) shall be uniform, to the extent practicable.'.

(2) EFFECTIVE DATE- The amendment made by paragraph (1) shall become effective at the end of the 180-day period beginning on the date of enactment of this Act.

(f) MEETING COMMUNITY CREDIT NEEDS- Section 5(a) of the International Banking Act of 1978 (12 U.S.C. 3103(a)) (as amended by section 104 of this Act) is amended by inserting after paragraph (7) the following new paragraph:

'(8) CONTINUING REQUIREMENT FOR MEETING COMMUNITY CREDIT NEEDS AFTER INITIAL INTERSTATE ENTRY BY ACQUISITION-

'(A) IN GENERAL- If a foreign bank acquires a bank or a branch of a bank, in a State in which the foreign bank does not maintain a branch, and such acquired bank is, or is part of, a regulated financial institution (as defined in section 803 of the Community Reinvestment Act of 1977), the Community Reinvestment Act of 1977 shall continue to apply to each branch of the foreign bank which results from the acquisition as if such branch were a regulated financial institution.

'(B) EXCEPTION FOR BRANCH THAT RECEIVES

ONLY DEPOSITS PERMISSIBLE FOR AN EDGE ACT CORPORATION- Paragraph (1) shall not apply to any branch that receives only such deposits as are permissible for a corporation organized under section 25A of the Federal Reserve Act to receive.'. SEC. 108. FEDERAL RESERVE BOARD STUDY ON BANK FEES. (a) IN GENERAL- Section 1002 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 1811 note) is amended to read as follows:

'SEC. 1002. SURVEY OF BANK FEES AND SERVICES.

'(a) ANNUAL SURVEY REQUIRED- The Board of Governors of the Federal Reserve System shall obtain a sample, which is representative by geographic location and size of the institution, of--

'(1) certain retail banking services provided by insured depository institutions; and

'(2) the fees, if any, which are imposed by such institutions for providing any such service, including fees imposed for not sufficient funds, deposit items returned, and automated teller machine transactions.

'(b) ANNUAL REPORT TO CONGRESS REQUIRED-

'(1) PREPARATION- The Board of Governors of the Federal Reserve System shall prepare a report of the results of each survey conducted pursuant to subsection (a).

'(2) CONTENTS OF THE REPORT- Each report prepared pursuant to paragraph (1) shall include--

'(A) a description of any discernible trend, in the Nation as a whole and in each region, in the cost and availability of retail banking services which delineates differences on the basis of size of the institution and engagement in multistate activity; and

'(B) a description of the correlation, if any, among the following factors:

'(i) An increase or decrease in the amount of any deposit insurance premium assessed by the Federal Deposit Insurance Corporation against insured depository institutions.

'(ii) An increase or decrease in the amount of the fees imposed by such institutions for providing retail banking services.

'(iii) A decrease in the availability of such services.

'(3) SUBMISSION TO CONGRESS- The Board of Governors of the Federal Reserve System shall submit an annual report to the Congress not later than September 1, 1995, and not later than June 1 of each subsequent year.'.

(b) SUNSET- The requirements of subsection (a) shall not apply after the end of the 7-year period beginning on the date of enactment of this Act.

SEC. 109. PROHIBITION AGAINST DEPOSIT PRODUCTION OFFICES. (a) REGULATIONS- The appropriate Federal banking agencies shall prescribe uniform regulations effective June 1, 1997, which prohibit any out-of-State bank from using any authority to engage in

interstate branching pursuant to this title, or any amendment made by this title to any other provision of law, primarily for the purpose of deposit production.

(b) GUIDELINES FOR MEETING CREDIT NEEDS- Regulations issued under subsection (a) shall include guidelines to ensure that interstate branches operated by an out-of-State bank in a host State are reasonably helping to meet the credit needs of the communities which the branches serve.

(c) LIMITATION ON OUT-OF-STATE LOANS-

(1) LIMITATION- Regulations issued under subsection (a) shall require that, beginning no earlier than 1 year after establishment or acquisition of an interstate branch or branches in a host State by an out-of-State bank, if the appropriate Federal banking agency for the out-of-State bank determines that the bank's level of lending in the host State relative to the deposits from the host State (as reasonably determinable from available information including the agency's sampling of the bank's loan files during an examination or such data as is otherwise available) is less than half the average of total loans in the host State relative to total deposits from the host State (as determinable from relevant sources) for all banks the home State of which is such State-- (A) the appropriate Federal banking agency for the out-of-State bank shall review the loan portfolio of the bank and determine whether the bank is reasonably helping to meet the credit needs of the communities served by the bank in the host State; and

(B) if the agency determines that the out-of-State bank is not reasonably helping to meet those needs-- (i) the agency

may order that an interstate branch or branches of such bank in the host State be closed unless the bank provides reasonable assurances to the satisfaction of the appropriate Federal banking agency that the bank has an acceptable plan that will reasonably help to meet the credit needs of the communities served by the bank in the host State, and (ii) the out-of-State bank may not open a new interstate branch in the host State unless the bank provides reasonable assurances to the satisfaction of the appropriate Federal banking agency that the bank will reasonably help to meet the credit needs of the community that the new branch will serve. (2) CONSIDERATIONS- In making a determination under paragraph (1)(A), the appropriate Federal banking agency shall consider-- (A) whether the interstate branch or branches of the out-of-State bank were formerly part of a failed or failing depository institution;

(B) whether the interstate branch was acquired under circumstances where there was a low loan-to-deposit ratio because of the nature of the acquired institution's business or loan portfolio;

(C) whether the interstate branch or branches of the out-of-State bank have a higher concentration of commercial or credit card lending, trust services, or other specialized activities;

(D) the ratings received by the out-of-State bank under the Community Reinvestment Act of 1977;

(E) economic conditions, including the level of loan demand, within the communities served by the interstate branch or branches of the out-of-State bank; and (F) the safe and sound operation and condition of the out-of-State

bank.

(3) Branch closing procedure-

(A) NOTICE REQUIRED- Before exercising any authority under paragraph (1)(B)(i), the appropriate Federal banking agency shall issue to the bank a notice of the agency's intention to close an interstate branch or branches and shall schedule a hearing.

(B) HEARING- Section 8(h) of the Federal Deposit Insurance Act shall apply to any proceeding brought under this paragraph.

(d) APPLICATION- This section shall apply with respect to any interstate branch established or acquired in a host State pursuant to this title or any amendment made by this title to any other provision of law.

(e) DEFINITIONS- For the purposes of this section, the following definitions shall apply:

(1) APPROPRIATE FEDERAL BANKING AGENCY, BANK, STATE, AND STATE BANK- The terms 'appropriate Federal banking agency', 'bank', 'State', and 'State bank'have the same meanings as in section 3 of the Federal Deposit Insurance Act. (2) HOME STATE- The term 'home State'means-- (A) in the case of a national bank, the State in which the main office of the bank is located; and (B) in the case of a State bank, the State by which the bank is chartered.

(3) HOST STATE- The term 'host State'means a State in which a bank establishes a branch other than the home

State of the bank.

(4) INTERSTATE BRANCH- The term 'interstate branch'means a branch established pursuant to this title or any amendment made by this title to any other provision of law. (5) OUT-OF-STATE BANK- The term 'out-of-State bank'means, with respect to any State, a bank the home State of which is another State and, for purposes of this section, includes a foreign bank, the home State of which is another State. (a) IN GENERAL- Section 807 of the Community Reinvestment Act of 1977 (12 U.S.C. 2906) is amended by adding at the end the following new subsections:

'(d) INSTITUTIONS WITH INTERSTATE BRANCHES-

'(1) STATE-BY-STATE EVALUATION- In the case of a regulated financial institution that maintains domestic branches in 2 or more States, the appropriate Federal financial supervisory agency shall prepare--

'(A) a written evaluation of the entire institution's record of performance under this title, as required by subsections (a), (b), and (c); and

'(B) for each State in which the institution maintains 1 or more domestic branches, a separate written evaluation of the institution's record of performance within such State under this title, as required by subsections (a), (b), and (c).

'(2) MULTISTATE METROPOLITAN AREAS- In the case of a regulated financial institution that maintains domestic branches in 2 or more States within a multistate metropolitan area, the appropriate Federal financial

supervisory agency shall prepare a separate written evaluation of the institution's record of performance within such metropolitan area under this title, as required by subsections (a), (b), and (c). If the agency prepares a written evaluation pursuant to this paragraph, the scope of the written evaluation required under paragraph (1)(B) shall be adjusted accordingly.

'(3) CONTENT OF STATE LEVEL EVALUATION- A written evaluation prepared pursuant to paragraph (1)(B) shall--

'(A) present the information required by subparagraphs (A) and (B) of subsection (b)(1) separately for each metropolitan area in which the institution maintains 1 or more domestic branch offices and separately for the remainder of the nonmetropolitan area of the State if the institution maintains 1 or more domestic branch offices in such nonmetropolitan area; and

'(B) describe how the Federal financial supervisory agency has performed the examination of the institution, including a list of the individual branches examined.

'(e) DEFINITIONS- For purposes of this section the following definitions shall apply:

'(1) DOMESTIC BRANCH- The term 'domestic branch'means any branch office or other facility of a regulated financial institution that accepts deposits, located in any State.

'(2) METROPOLITAN AREA- The term 'metropolitan area'means any primary metropolitan statistical area,

metropolitan statistical area, or consolidated metropolitan statistical area, as defined by the Director of the Office of Management and Budget, with a population of 250,000 or more, and any other area designated as such by the appropriate Federal financial supervisory agency.

'(3) STATE- The term 'State'has the same meaning as in section 3 of the Federal Deposit Insurance Act.'. (b) SEPARATE PRESENTATION- Section 807(b)(1) of the Community Reinvestment Act of 1977 (12 U.S.C. 2906(b)(1)) is amended-- (1) by redesignating subparagraphs (A) through (C) as clauses (i) through (iii), respectively;

(2) by striking 'The public'and inserting the following:

'(A) CONTENTS OF WRITTEN EVALUATION- The public'; and (3) by adding at the end the following new subparagraph:

'(B) METROPOLITAN AREA DISTINCTIONS- The information required by clauses (i) and (ii) of subparagraph (A) shall be presented separately for each metropolitan area in which a regulated depository institution maintains one or more domestic branch offices.'.

SEC. 111. RESTATEMENT OF EXISTING LAW.

No provision of this title and no amendment made by this title to any other provision of law shall be construed as affecting in any way--

(1) the authority of any State or political subdivision of any State to adopt, apply, or administer any tax or method

of taxation to any bank, bank holding company, or foreign bank, or any affiliate of any such bank, bank holding company, or foreign bank, to the extent that such tax or tax method is otherwise permissible by or under the Constitution of the United States or other Federal law;

(2) the right of any State, or any political subdivision of any State, to impose or maintain a nondiscriminatory franchise tax or other nonproperty tax instead of a franchise tax in accordance with section 3124 of title 31, United States Code; or (3) the applicability of section 5197 of the Revised Statutes or section 27 of the Federal Deposit Insurance Act. (a) IN GENERAL- The Comptroller General of the United States shall submit to the Congress, not later than 9 months after the date of enactment of this Act, a report that--

(1) examines statutory and regulatory requirements for insured depository institutions to collect and report deposit and lending data; and

(2) determines what modifications to such requirements are needed, so that the implementation of the interstate branching provisions contained in this title will result in no material loss of information important to regulatory or congressional oversight of insured depository institutions. (b) CONSULTATION- The Comptroller General, in preparing the report required by this section, shall consult with individuals representing the appropriate Federal banking agencies, insured depository institutions, consumers, community groups, and other interested parties.

(c) DEFINITIONS- For purposes of this section, the terms 'appropriate Federal banking agency'and 'insured

depository institution'have the same meanings as in section 3 of the Federal Deposit Insurance Act.

SEC. 113. MAXIMUM INTEREST RATE ON CERTAIN FMHA LOANS. (a) IN GENERAL- Section 307(a) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1927(a)) is amended--

(1) in paragraph (3)(A), by striking 'Except'and inserting 'Notwithstanding the provisions of the constitution or laws of any State limiting the rate or amount of interest that may be charged, taken, received, or reserved, except'; and (2) in paragraph (5)--

(A) by striking

'(5) The'and inserting

'(5)(A) Except as provided in subparagraph (B), the'; and

(B) by adding at the end the following new subparagraph:

'(B) In the case of a loan made under section 310B as a guaranteed loan, subparagraph (A) shall apply notwithstanding the provisions of the constitution or laws of any State limiting the rate or amount of interest that may be charged, taken, received, or reserved.'.

(b) EFFECTIVE DATES-

(1) IN GENERAL- Except as provided in paragraphs (2) and (3), the amendments made by subsection (a) shall apply to a loan made, insured, or guaranteed under the Consolidated Farm and Rural Development Act (7 U.S.C.

1921 et seq.) in a State on or after the date of enactment of this Act.

(2) STATE OPTION- Except as provided in paragraph (3), the amendments made by subsection (a) shall not apply to a loan made, insured, or guaranteed under the Consolidated Farm and Rural Development Act in a State after the date (that occurs during the 3-year period beginning on the date of enactment of this Act) on which the State adopts a law or certifies that the voters of the State have voted in favor of a provision of the constitution or law of the State that states that the State does not want the amendments made by subsection (a) to apply with respect to loans made, insured, or guaranteed under such Act in the State.

(3) TRANSITIONAL PERIOD- In any case in which a State takes an action described in paragraph (2), the amendments made by subsection (a) shall continue to apply to a loan made, insured, or guaranteed under the Consolidated Farm and Rural Development Act in the State after the date the action was taken pursuant to a commitment for the loan that was entered into during the period beginning on the date of enactment of this Act, and ending on the date on which the State takes the action. Chapter 4 of title LXII of the Revised Statutes (12 U.S.C. 21 et seq.) is amended by adding at the end the following new section: 'SEC. 5244. INTERPRETATIONS CONCERNING PREEMPTION OF CERTAIN STATE LAWS.

'(a) NOTICE AND OPPORTUNITY FOR COMMENT REQUIRED- Before issuing any opinion letter or interpretive rule, in response to a request or upon the agency's own motion, that concludes that Federal law

preempts the application to a national bank of any State law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches, or before making a determination under section 5155(f)(1)(A)(ii) of the Revised Statutes, the appropriate Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act) shall--

'(1) publish in the Federal Register notice of the preemption or discrimination issue that the agency is considering (including a description of each State law at issue);

'(2) give interested parties not less than 30 days in which to submit written comments; and

'(3) in developing the final opinion letter or interpretive rule issued by the agency, or making any determination under section 5155(f)(1)(A)(ii) of the Revised Statutes, consider any comments received.

'(b) PUBLICATION REQUIRED- The appropriate Federal banking agency shall publish in the Federal Register--

'(1) any final opinion letter or interpretive rule concluding that Federal law preempts the application of any State law regarding community reinvestment, consumer protection, fair lending, or establishment of intrastate branches to a national bank; and

'(2) any determination under section 5155(f)(1)(A)(ii) of the Revised Statutes.

'(c) EXCEPTIONS-

'(1) NO NEW ISSUE OR SIGNIFICANT BASIS- This section shall not apply with respect to any opinion letter or interpretive rule that--

'(A) raises issues of Federal preemption of State law that are essentially identical to those previously resolved by the courts or on which the agency has previously issued an opinion letter or interpretive rule; or

'(B) responds to a request that contains no significant legal basis on which to make a preemption determination.

'(2) JUDICIAL, LEGISLATIVE, OR INTRAGOVERNMENTAL MATERIALS- This section shall not apply with respect to materials prepared for use in judicial proceedings or submission to Congress or a Member of Congress, or for intragovernmental use.

'(3) EMERGENCY- The appropriate Federal banking agency may make exceptions to subsection (a) if--

'(A) the agency determines in writing that the exception is necessary to avoid a serious and imminent threat to the safety and soundness of any national bank; or

'(B) the opinion letter or interpretive rule is issued in connection with--

'(i) an acquisition of 1 or more banks in default or in danger of default (as such terms are defined in section 3 of the Federal Deposit Insurance Act); or

'(ii) an acquisition with respect to which the Federal Deposit Insurance Corporation provides assistance under

section 13(c) of the Federal Deposit Insurance Act.'.

(a) BRANCHES, AGENCIES, AND AFFILIATES- Section 7(c)(1)(D) of the International Banking Act of 1978 shall not apply with respect to any examination under section 7(c)(1)(A) of such Act which begins before or during the 3-year period beginning on July 25, 1994. (b) REPRESENTATIVE OFFICES- The provision of section 10(c) of the International Banking Act of 1978 relating to the cost of examinations under such section shall not apply with respect to any examination under such section which begins before or during the 3-year period beginning on July 25, 1994.

TITLE II--GENERAL PROVISIONS (a) FEDERAL DEPOSIT INSURANCE ACT- Section 11(d)(14) of the Federal Deposit Insurance Act (12 U.S.C. 1821(d)(14)) is amended by adding at the end the following new subparagraph:

'(C) REVIVAL OF EXPIRED STATE CAUSES OF ACTION-

'(i) IN GENERAL- In the case of any tort claim described in clause (ii) for which the statute of limitation applicable under State law with respect to such claim has expired not more than 5 years before the appointment of the Corporation as conservator or receiver, the Corporation may bring an action as conservator or receiver on such claim without regard to the expiration of the statute of limitation applicable under State law.

'(ii) CLAIMS DESCRIBED- A tort claim referred to in clause (i) is a claim arising from fraud, intentional

misconduct resulting in unjust enrichment, or intentional misconduct resulting in substantial loss to the institution.'.

(b) FEDERAL HOME LOAN BANK ACT- Section 21A(b)(14) of the Federal Home Loan Bank Act (12 U.S.C. 1441a(b)(14)) is amended by adding at the end the following new subparagraph:

'(E) REVIVAL OF EXPIRED STATE CAUSES OF ACTION- In the case of any tort claim described in subparagraph (A)(ii) for which the statute of limitation applicable under State law with respect to such claim has expired not more than 5 years before the appointment of the Corporation as conservator or receiver, the Corporation may bring an action as conservator or receiver on such claim without regard to the expiration of the statute of limitation applicable under State law.'.

(a) FINDINGS- The Senate finds that--

(1) the United States and its allies have agreed that as of March 31, 1994, the Coordinating Committee (hereafter referred to as 'COCOM'), the multilateral body that controlled strategic exports to the former Soviet Union and other Communist States, ceased to exist;

(2) no successor has yet been established to replace the COCOM; (3) threats to United States security are posed by rogue regimes that support terrorism as a matter of national policy; (4) a critical element of the United States proposal for a successor to COCOM is that supplier nations agree on a list of militarily critical products and technologies that would be denied to a handful of rogue regimes;

(5) some allies of the United States oppose this principle and instead propose that such controls be left to 'national discretion', effectively replacing multilateral export controls with a loose collection of unilateral export control policies which would be adverse for United States security and economic interests;

(6) multilateral controls are needed to thwart efforts of Iran, Iraq, North Korea, Libya, and other rogue regimes, to acquire arms and sensitive dual-use goods and technologies that could contribute to their efforts to build weapons of mass destruction; and

(7) the United States would be forced to make the difficult choice of choosing between unilateral export controls under the Export Administration Act of 1979, which would put American companies at a competitive disadvantage worldwide, or allowing exports that could seriously harm the national security interests of the United States.

(b) SENSE OF THE SENATE- It is the sense of the Senate that-- (1) the President should work to achieve a clearly defined and enforceable agreement with allies of the United States which establishes a multilateral export control system for the proliferation of products and technologies to rogue regimes that would jeopardize the national security of the United States; and

(2) the President should persuade allies of the United States to promote mutual security interests by preventing rogue regimes from obtaining militarily critical products and technologies.

Title III of Public law 102-281 (31 U.S.C. 5111 note) is

amended-- (1) in section 303(b), by striking 'entitlement'and inserting 'enactment'; and

(2) in section 307 by striking subsection (b) and inserting the following:

'(b) NO EXPENDITURES IN ADVANCE OF RECEIPT OF FUNDS- The Secretary of the Treasury shall begin minting and issuing the medals described in section 302 whenever there are any funds available to cover the cost of minting and issuing any such medals from amounts received by the Secretary under section 305 and donations by private persons, and shall continue minting and issuing such medals, subject to the availability of funds to cover the costs, until all of the medals authorized have been issued.'. SEC. 204. COMMEMORATION OF 1995 SPECIAL OLYMPIC WORLD GAMES. (a) COIN SPECIFICATIONS-

(1) ONE DOLLAR SILVER COINS-

(A) ISSUANCE- The Secretary of the Treasury (hereafter in this section referred to as the 'Secretary') shall issue not more than 800,000 $1 coins, which shall weigh 26.73 grams, have a diameter of 1.500 inches, and shall contain 90 percent silver and 10 percent copper. (B) DESIGN- The design of the coins issued under this section shall be emblematic of the 1995 Special Olympics World Games. On each such coin there shall be a designation of the value of the coin, an inscription of the year '1995', and inscriptions of the words 'Liberty', 'In God We Trust', 'United States of America', and 'E Pluribus Unum'. (2) LEGAL TENDER- The coins issued under this section shall be legal tender as provided in section 5103 of title 31,

United States Code.

(3) NUMISMATIC ITEMS- For purposes of section 5132(a)(1) of title 31, United States Code, all coins minted under this section shall be considered to be numismatic items. (b) SOURCES OF BULLION- The Secretary shall obtain silver for the coins minted under this section only from stockpiles established under the Strategic and Critical Materials Stock Piling Act. (c) SELECTION OF DESIGN- The design for the coins authorized by this section shall be selected by the Secretary after consultation with the 1995 Special Olympics World Games Organizing Committee, Inc. and the Commission of Fine Arts. As required by section 5135 of title 31, United States Code, the design shall also be reviewed by the Citizens Commemorative Coin Advisory Committee. (d) ISSUANCE OF THE COINS-

(1) QUALITY OF COINS- The coins authorized under this section may be issued in uncirculated and proof qualities. (2) MINT FACILITY- Not more than 1 facility of the United States Mint may be used to strike any particular quality of the coins minted under this section.

(3) PERIOD FOR ISSUANCE- The Secretary shall issue coins minted under this section during the period beginning on January 15, 1995, and ending on December 31, 1995. (e) SALE OF THE COINS-

(1) SALE PRICE- The coins issued under this section shall be sold by the Secretary at a price equal to the sum of the face value of the coins, the surcharge provided in paragraph (4) with respect to such coins, and the cost of designing and issuing such coins (including labor, materials, dies, use

of machinery, overhead expenses, marketing, and shipping).
(2) BULK SALES- The Secretary shall make bulk sales at a reasonable discount.

(3) PREPAID ORDERS- The Secretary shall accept prepaid orders for the coins authorized under this section prior to the issuance of such coins. Sales under this subsection shall be at a reasonable discount.

(4) SURCHARGE REQUIRED- All sales shall include a surcharge of $10 per coin.

(5) INTERNATIONAL SALES- The Secretary, in cooperation with the 1995 Special Olympics World Games Organizing Committee, shall develop an international marketing program to promote and sell coins outside of the United States.

(f) GENERAL WAIVER OF PROCUREMENT REGULATIONS- No provision of law governing procurement or public contracts shall be applicable to the procurement of goods or services necessary for carrying out the provisions of this section. Nothing in this subsection shall relieve any person entering into a contract under the authority of this section from complying with any law relating to equal employment opportunity.

(g) DISTRIBUTION OF SURCHARGES- The total surcharges collected by the Secretary from the sale of the coins issued under this section shall be promptly paid by the Secretary to the 1995 Special Olympics World Games Organizing Committee, Inc. Such amounts shall be used to--

(1) provide a world class sporting event for athletes with mental retardation;

(2) demonstrate to a global audience the extraordinary talents, dedication, and courage of persons with mental retardation; and

(3) underwrite the cost of staging and promoting the 1995 Special Olympics World Games.

(h) AUDITS- The Comptroller General of the United States shall have the right to examine such books, records, documents, and other data of the 1995 Special Olympics World Games Organizing Committee, Inc. as may be related to the expenditure of amounts paid under subsection (g).

(i) FINANCIAL ASSURANCES-

(1) NO NET COST TO THE GOVERNMENT- The Secretary shall take all actions necessary to ensure that the issuance of the coins authorized by this section shall result in no net cost to the United States Government.

(2) ADEQUATE SECURITY FOR PAYMENT REQUIRED- No coin shall be issued under this section unless the Secretary has received-- (A) full payment therefor;

(B) security satisfactory to the Secretary to indemnify the United States for full payment; or

(C) a guarantee of full payment satisfactory to the Secretary from a depository institution whose deposits are

insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration Board. SEC. 205. NATIONAL COMMUNITY SERVICE COMMEMORATIVE COINS. (a) COIN SPECIFICATIONS-

(1) $1 SILVER COINS- The Secretary of the Treasury (hereafter in this section referred to as the 'Secretary') shall mint and issue not more than 500,000 $1 coins to commemorate students who volunteer to perform community service, which shall--

(A) weigh 26.73 grams;

(B) have a diameter of 1.500 inches; and (C) contain 90 percent silver and 10 percent copper. (2) LEGAL TENDER- The coins issued under this section shall be legal tender, as provided in section 5103 of title 31, United States Code.

(3) NUMISMATIC ITEMS- For purposes of section 5134 of title 31, United States Code, all coins minted under this section shall be considered to be numismatic items.

(b) SOURCES OF BULLION- The Secretary shall obtain silver for the coins minted under this section only from stockpiles established under the Strategic and Critical Minerals Stock Piling Act. (c) DESIGN OF COINS-

(1) DESIGN REQUIREMENTS-

(A) IN GENERAL- The design of the coins minted under this section shall be emblematic of community services provided by student volunteers.

(B) DESIGNATION AND INSCRIPTIONS- On each coin minted under this section there shall be--

(i) a designation of the value of the coin; (ii) an inscription of the year '1996'; and (iii) inscriptions of the words 'Liberty', 'In God We Trust', 'United States of America', and 'E Pluribus Unum'.

(2) SELECTION- The design for the coins authorized by this section shall be--

(A) selected by the Secretary after consultation with the National Community Service Trust and the Commission of Fine Arts; and

(B) reviewed by the Citizens Commemorative Coin Advisory Committee.

(d) ISSUANCE OF COINS-

(1) QUALITY OF COINS- Coins minted under this section shall be issued in uncirculated and proof qualities.
(2) MINT FACILITY- Only 1 facility of the United States Mint may be used to strike any particular quality of the coins minted under this section.

(3) PERIOD FOR ISSUANCE- The Secretary shall issue coins minted under this section for a period of not less than 6 months and not more than 12 months, beginning no later than September 1, 1996.

(e) SALE OF COINS-

(1) SALE PRICE- The coins issued under this section shall

be sold by the Secretary at a price equal to the sum of--
(A) the face value of the coins;

(B) the surcharge provided in paragraph (4) with respect to such coins; and

(C) the cost of designing and issuing the coins (including labor, materials, dies, use of machinery, overhead expenses, marketing, and shipping). (2) BULK SALES- The Secretary shall make bulk sales of the coins issued under this section available at a reasonable discount.

(3) PREPAID ORDERS-

(A) IN GENERAL- The Secretary shall accept prepaid orders for the coins minted under this section before the issuance of such coins.

(B) DISCOUNT- Sale prices with respect to prepaid orders under subparagraph (A) shall be at a reasonable discount.
(4) SURCHARGES- All sales shall include a surcharge of $10 per coin.

(f) GENERAL WAIVER OF PROCUREMENT REGULATIONS- (1) IN GENERAL- Except as provided in paragraph (2), no provision of law governing procurement or public contracts shall be applicable to the procurement of goods and services necessary for carrying out the provisions of this section. (2) EQUAL EMPLOYMENT OPPORTUNITY- Paragraph (1) shall not relieve any person entering into a contract under the authority of this section from complying with any law relating to equal employment opportunity.

(g) DISTRIBUTION OF SURCHARGES-

(1) IN GENERAL- All surcharges received by the Secretary from the sale of coins issued under this section shall be promptly paid by the Secretary to the National Community Service Trust for the purpose of funding innovative community service programs at American universities, including the service, research, and teaching activities of faculty and students involved in such programs.

(2) AUDITS- The Comptroller General of the United States shall have the right to examine such books, records, documents, and other data of the National Community Service Trust as may be related to the expenditures of amounts paid under paragraph (1).

(h) FINANCIAL ASSURANCES-

(1) NO NET COST TO THE GOVERNMENT- The Secretary shall take such actions as may be necessary to ensure that minting and issuing coins under this section will not result in any net cost to the United States Government.

(2) PAYMENT FOR COINS- A coin shall not be issued under this section unless the Secretary has received--

(A) full payment for the coin;

(B) security satisfactory to the Secretary to indemnify the United States for full payment; or

(C) a guarantee of full payment satisfactory to the Secretary from a depository institution whose deposits are insured by the Federal Deposit Insurance Corporation or the

National Credit Union Administration Board. SEC. 206. ROBERT F. KENNEDY MEMORIAL COMMEMORATIVE COINS. (a) COIN SPECIFICATIONS-

(1) $1 SILVER COINS- The Secretary of the Treasury (hereafter in this section referred to as the 'Secretary') shall mint and issue not more than 500,000 $1 coins to commemorate the life and work of Robert F. Kennedy, which shall-- (A) weigh 26.73 grams;

(B) have a diameter of 1.500 inches; and (C) contain 90 percent silver and 10 percent copper. (2) LEGAL TENDER- The coins issued under this section shall be legal tender, as provided in section 5103 of title 31, United States Code.

(3) NUMISMATIC ITEMS- For purposes of section 5134 of title 31, United States Code, all coins minted under this section shall be considered to be numismatic items.

(b) SOURCES OF BULLION- The Secretary shall obtain silver for the coins minted under this section only from stockpiles established under the Strategic and Critical Minerals Stock Piling Act. (c) DESIGN OF COINS-

(1) DESIGN REQUIREMENTS-

(A) IN GENERAL- The design of the coins minted under this section shall be emblematic of the life and work of Robert F. Kennedy.

(B) DESIGNATION AND INSCRIPTIONS- On each coin minted under this section there shall be--

(i) a designation of the value of the coin; (ii) an inscription of the year '1998'; and (iii) inscriptions of the words 'Liberty', 'In God We Trust', 'United States of America', and 'E Pluribus Unum'.

(2) SELECTION- The design for the coins authorized by this section shall be--

(A) selected by the Secretary after consultation with the Robert F. Kennedy Memorial and the Commission of Fine Arts; and

(B) reviewed by the Citizens Commemorative Coin Advisory Committee.

(d) ISSUANCE OF COINS-

(1) QUALITY OF COINS- Coins minted under this section shall be issued in uncirculated and proof qualities.
(2) MINT FACILITY- Only 1 facility of the United States Mint may be used to strike any particular quality of the coins minted under this section.

(3) PERIOD FOR ISSUANCE- The Secretary shall issue coins minted under this section for a period of not less than 6 months and not more than 12 months, beginning no later than January 1, 1998.

(e) SALE OF COINS-

(1) SALE PRICE- The coins issued under this section shall be sold by the Secretary at a price equal to the sum of--
(A) the face value of the coins;

(B) the surcharge provided in paragraph (4) with respect to such coins; and

(C) the cost of designing and issuing the coins (including labor, materials, dies, use of machinery, overhead expenses, marketing, and shipping). (2) BULK SALES- The Secretary shall make bulk sales of the coins issued under this section available at a reasonable discount.

(3) PREPAID ORDERS-

(A) IN GENERAL- The Secretary shall accept prepaid orders for the coins minted under this section before the issuance of such coins.

(B) DISCOUNT- Sale prices with respect to prepaid orders under subparagraph (A) shall be at a reasonable discount. (4) SURCHARGES- All sales shall include a surcharge of $10 per coin.

(f) GENERAL WAIVER OF PROCUREMENT REGULATIONS- (1) IN GENERAL- Except as provided in paragraph (2), no provision of law governing procurement or public contracts shall be applicable to the procurement of goods and services necessary for carrying out the provisions of this section. (2) EQUAL EMPLOYMENT OPPORTUNITY- Paragraph (1) shall not relieve any person entering into a contract under the authority of this section from complying with any law relating to equal employment opportunity.

(g) DISTRIBUTION OF SURCHARGES-

(1) IN GENERAL- All surcharges received by the

Secretary from the sale of coins issued under this section shall be promptly paid by the Secretary to the Robert F. Kennedy Memorial for the purpose of improving the endowment of the Robert F. Kennedy Memorial.

(2) AUDITS- The Comptroller General of the United States shall have the right to examine such books, records, documents, and other data of the Robert F. Kennedy Memorial as may be related to the expenditures of amounts paid under paragraph (1). (h) FINANCIAL ASSURANCES-

(1) NO NET COST TO THE GOVERNMENT- The Secretary shall take such actions as may be necessary to ensure that minting and issuing coins under this section will not result in any net cost to the United States Government.

(2) PAYMENT FOR COINS- A coin shall not be issued under this section unless the Secretary has received--

(A) full payment for the coin;

(B) security satisfactory to the Secretary to indemnify the United States for full payment; or

(C) a guarantee of full payment satisfactory to the Secretary from a depository institution whose deposits are insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration Board. (a) COIN SPECIFICATIONS-

(1) ONE DOLLAR SILVER COINS-

(A) ISSUANCE- The Secretary shall issue not more than

500,000 $1 coins, which shall weigh 26.73 grams, have a diameter of 1.500 inches, and shall contain 90 percent silver and 10 percent copper.

(B) DESIGN- The design of the $1 coins shall be emblematic of the United States Military Academy and its motto 'Duty, Honor, Country'. On each such coin there shall be a designation of the value of the coin, an inscription of the year '2002', and inscriptions of the words 'Liberty', 'In God We Trust', 'United States of America', and 'E Pluribus Unum'.

(2) LEGAL TENDER- The coins issued under this section shall be legal tender as provided in section 5103 of title 31, United States Code.

(b) SOURCES OF BULLION- The Secretary shall obtain silver for the coins minted under this section only from stockpiles established under the Strategic and Critical Materials Stock Piling Act. (c) SELECTION OF DESIGN- The design of the coins minted under this section shall be selected by the Secretary after consultation with the Commission of Fine Arts and the Bicentennial Steering Group, Association of Graduates, United States Military Academy. As required by section 5135 of title 31, United States Code, the designs shall also be reviewed by the Citizens Commemorative Coin Advisory Committee.

(d) ISSUANCE OF THE COINS-

(1) QUALITY AND MINT FACILITY- The coins authorized under this section may be issued in uncirculated and proof qualities and shall be struck at the United States Bullion Depository at West Point.

(2) PERIOD FOR ISSUANCE- The Secretary shall issue coins minted under this section during the period beginning on March 16, 2002, and ending on March 16, 2003.

(3) SUNSET PROVISION- No coins shall be minted under this section after December 31, 2002.

(e) SALE OF THE COINS-

(1) SALE PRICE- The coins issued under this section shall be sold by the Secretary at a price equal to the sum of the face value of the coins, the surcharge provided in paragraph (4) with respect to such coins, and the cost of designing and issuing such coins (including labor, materials, dies, use of machinery, overhead expenses, marketing, and shipping). (2) BULK SALES- The Secretary shall make bulk sales available at a reasonable discount.

(3) PREPAID ORDERS- The Secretary shall accept prepaid orders for the coins prior to the issuance of such coins. Sales under this paragraph shall be at a reasonable discount. (4) SURCHARGE REQUIRED- All sales shall include a surcharge of $10 per coin.

(f) GENERAL WAIVER OF PROCUREMENT REGULATIONS- No provision of law governing procurement or public contracts shall be applicable to the procurement of goods and services necessary for carrying out the provisions of this section. Nothing in this subsection shall relieve any person entering into a contract under the authority of this section from complying with any law relating to equal employment opportunity.

(g) DISTRIBUTION OF SURCHARGES- The total

surcharges collected by the Secretary from the sale of the coins issued under this section shall be promptly paid by the Secretary to the Association of Graduates, United States Military Academy to assist the Association of Graduates'efforts to provide direct support to the academic, military, physical, moral, and ethical development programs of the Corps of Cadets, United States Military Academy.
(h) AUDITS- The Comptroller General of the United States shall have the right to examine such books, records, documents, and other data of the Association of Graduates, United States Military Academy as may be related to the expenditure of amounts paid under subsection (g).

(i) NUMISMATIC PUBLIC ENTERPRISE FUND- The coins issued under this section are subject to the provisions of section 5134 of title 31, United States Code, relating to the Numismatic Public Enterprise Fund.

(j) FINANCIAL ASSURANCES-

(1) NO NET COST TO THE GOVERNMENT- The Secretary shall take all actions necessary to ensure that the issuance of the coins authorized by this section shall result in no net cost to the United States Government.

(2) ADEQUATE SECURITY FOR PAYMENT REQUIRED- No coin shall be issued under this section unless the Secretary has received-- (A) full payment therefor;

(B) security satisfactory to the Secretary to indemnify the United States for full payment; or

(C) a guarantee of full payment satisfactory to the Secretary from a depository institution whose deposits are

insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration Board. SEC. 208. UNITED STATES BOTANIC GARDEN COMMEMORATIVE COINS. (a) COIN SPECIFICATIONS-

(1) ONE-DOLLAR SILVER COINS-

(A) ISSUANCE- The Secretary of the Treasury (hereafter in this section referred to as the 'Secretary') shall mint and issue not more than 500,000 $1 coins, which shall weigh 26.73 grams, have a diameter of 1.500 inches, and contain 90 percent silver and 10 percent copper. (B) DESIGN- The design of the coins issued under this section shall be a rose, the national floral emblem, and a frontal view of the French facade of the United States Botanic Garden. On each coin there shall be a designation of the value of the coin, an inscription of the years '1820-1995', and inscriptions of the words 'Liberty', 'In God We Trust', 'United States of America', and 'E Pluribus Unum'.

(2) LEGAL TENDER- The coins issued under this section shall be legal tender, as provided in section 5103 of title 31, United States Code.

(3) NUMISMATIC ITEMS- For purposes of section 5134 of title 31, United States Code, all coins minted under this section shall be considered to be numismatic items.

(b) SOURCE OF BULLION- The Secretary shall obtain silver for the coins minted under this section only from stockpiles established under the Strategic and Critical Materials Stock Piling Act. (c) SELECTION OF DESIGN- The design for the coins minted under this section shall be--

(1) selected by the Secretary after consultation with the National Fund for the United States Botanic Garden and the Commission of Fine Arts; and

(2) reviewed by the Citizens Commemorative Coin Advisory Committee.

(d) ISSUANCE OF COINS-

(1) QUALITY OF COINS- Coins minted under this section may be issued in uncirculated and proof qualities.

(2) MINT FACILITY- Not more than 1 facility of the United States Mint may be used to strike any particular quality of the coins minted under this section.

(3) PERIOD OF ISSUANCE- The Secretary may issue coins minted under this section during the period beginning on January 1, 1997, and ending on December 31, 1997.

(e) SALE OF COINS-

(1) SALE PRICE- The coins authorized under this section shall be sold by the Secretary at a price equal to the sum of the face value of the coins, the surcharge provided in paragraph (4) with respect to such coins, and the cost of designing and issuing the coins (including labor, materials, dies, use of machinery, overhead expenses, marketing, and shipping). (2) BULK SALES- The Secretary shall make bulk sales available at a reasonable discount.

(3) PREPAID ORDERS- The Secretary shall accept prepaid orders for the coins authorized under this section prior to the issuance of such coins. Sales under this

paragraph shall be at a reasonable discount.

(4) SURCHARGE REQUIRED- All sales shall include a surcharge of $10 per coin.

(f) GENERAL WAIVER OF PROCUREMENT REGULATIONS- (1) IN GENERAL- Except as provided in paragraph (2), no provision of law governing procurement or public contracts shall be applicable to the procurement of goods and services necessary for carrying out the provisions of this section. (2) EQUAL EMPLOYMENT OPPORTUNITY- Paragraph (1) shall not relieve any person entering into a contract under the authority of this section from complying with any law relating to equal employment opportunity.

(g) DISTRIBUTION OF SURCHARGES- All surcharges received by the Secretary from the sale of coins issued under this section shall be promptly paid by the Secretary to the National Fund for the United States Botanic Garden.

(h) AUDITS- The Comptroller General of the United States shall have the right to examine such books, records, documents, and other data of the National Fund for the United States Botanic Garden as may be related to the expenditures of amounts paid under subsection (g).

(i) FINANCIAL ASSURANCES-

(1) NO NET COST TO THE GOVERNMENT- The Secretary shall take all actions necessary to ensure that the issuance of the coins authorized by this section shall result in no net cost to the United States Government.

(2) ADEQUATE SECURITY FOR PAYMENT REQUIRED- No coin shall be issued under this section unless the Secretary has received-- (A) full payment therefor;

(B) security satisfactory to the Secretary to indemnify the United States for full payment; or

(C) a guarantee of full payment satisfactory to the Secretary from a depository institution whose deposits are insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration Board.

SEC. 209. MOUNT RUSHMORE COMMEMORATIVE COINS.

(a) DISTRIBUTION OF SURCHARGES- Section 8 of the Mount Rushmore Commemorative Coin Act (104 Stat. 314; 31 U.S.C. 5112 note) is amended by striking paragraphs (1) and (2) and inserting the following:

'(1) the first $18,750,000 shall be paid during fiscal year 1994 by the Secretary to the Society to assist the Society's efforts to improve, enlarge, and renovate the Mount Rushmore National Memorial; and

'(2) the remainder shall be returned to the Federal Treasury for purposes of reducing the national debt.'.

(b) RETROACTIVE EFFECT- If, prior to the enactment of this Act, any amount of surcharges have been received by the Secretary of the Treasury and paid into the United States Treasury pursuant to section 8(1) of the Mount Rushmore Commemorative Coin Act, as in effect prior to

the enactment of this Act, that amount shall be paid out of the Treasury to the extent necessary to comply with section 8(1) of the Mount Rushmore Commemorative Coin Act, as in effect after the enactment of this Act. Amounts paid pursuant to the preceding sentence shall be out of funds not otherwise appropriated.

(c) NUMISMATIC OPERATING PROFITS- Nothing in this section shall be construed to affect the Secretary of the Treasury's right to derive operating profits from numismatic programs for use in supporting the United States Mint's numismatic operations and programs, or to allow the distribution of operating profits from the Numismatic Public Enterprise Fund to a recipient organization under any numismatic program.

(a) STUDY-

(1) IN GENERAL- The Secretary of the Treasury (hereafter in this section referred to as the 'Secretary') shall, after consultation with the Advisory Commission on Financial Services established under subsection (b), and consultation in accordance with paragraph (3), conduct a study of matters relating to the strengths and weaknesses of the United States financial services system in meeting the needs of the system's users, including the needs of--

(A) individual consumers and households; (B) communities;

(C) agriculture;

(D) small-, medium-, and large-sized businesses; (E) governmental and nonprofit entities; and (F) exporters and

other users of international financial services.

(2) MATTERS STUDIED- The study required under paragraph (1) shall include consideration of--

(A) the changes underway in the national and international economies and the financial services industry, and how those changes affect the financial services system's ability to efficiently meet the needs of the national economy and the system's users during the next 10 years and beyond; and

(B) the adequacy of existing statutes and regulations, and the existing regulatory structure, to meet the needs of the financial services system's users effectively, efficiently, and without unfair, anticompetitive, or discriminatory practices.

(3) CONSULTATION- Consultation in accordance with this paragraph means consultation with--

(A) the Board of Governors of the Federal Reserve System;

(B) the Commodity Futures Trading Commission;

(C) the Comptroller of the Currency;

(D) the Director of the Office of Thrift Supervision;

(E) the Federal Deposit Insurance Corporation; (F) the Secretary of the Department of Housing and Urban Development;

(G) the Securities and Exchange Commission;

(H) the Director of the Congressional Budget Office; and

(I) the Comptroller General of the United States.

(b) ADVISORY COMMISSION ON FINANCIAL SERVICES-

(1) ESTABLISHMENT- There is established the Advisory Commission on Financial Services (hereafter in this section referred to as the 'Advisory Commission').

(2) MEMBERSHIP OF COMMISSION- The Advisory Commission-- (A) shall consist of not less than 9 nor more than 14 members appointed by the Secretary from among individuals-- (i) who are--

(I) users of the financial services system; or (II) experts in finance or on the financial services system; and (ii) who are not employees of the Federal Government; and

(B) shall include representatives of business, agriculture, and consumers.

(3) CHAIRPERSON- The Secretary or the Secretary's designee shall serve as Chairperson of the Advisory Commission. (4) TRAVEL EXPENSES- Members of the Advisory Commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in performing services for the Advisory Commission. (5) TERMINATION- The Advisory Commission shall terminate 30 days after the date of submission of the report required under subsection (d).

(c) RECOMMENDATIONS- Based on the results of the study conducted under subsection (a), the Secretary shall develop such recommendations as may be appropriate for changes in statutes, regulations, and policies to improve the operation of the financial services system, including changes to better--

(1) meet the needs of, and assure access to the system for, current and potential users;

(2) promote economic growth;

(3) protect consumers;

(4) promote competition and efficiency;

(5) avoid risk to the taxpayers;

(6) control systemic risk; and

(7) eliminate discrimination.

(d) REPORT- Not later than '5 months after the date of enactment of this Act, the Secretary shall submit to the President pro tempore of the Senate and the Speaker of the House of Representatives a report describing the study conducted under subsection (a) and any recommendations developed under subsection (c).

SEC. 211. FLEXIBILITY IN CHOOSING BOARDS OF DIRECTORS. (a) IN GENERAL- Section 5146 of the Revised Statutes (12 U.S.C. 72) is amended in the 1st sentence, by striking 'two thirds' and inserting 'a majority'.

(b) PROVISION REPEAL- Effective on the date of enactment of the Riegle Community Development and Regulatory Improvement Act of 1994, this section and the amendment made by this section are repealed.

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

CATHERINE A. GHIGLIERI, TEXAS BANKING COMMISSIONER,
Petitioner

v.

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY;
SUN WORLD NATIONAL ASSOCIATION, EL PASO, TEXAS; AND
COMMERCIAL NATIONAL BANK OF TEXARKANA,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Case Nos. 96-50847 and 96-10818

PETITIONER'S APPENDIX VOLUME IV

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45pp

TABLE OF CONTENTS
APPENDIX

A. *Ghiglieri v. Sun World National Association*, Opinion of the United States Court of Appeals for the Fifth Circuit, Case Nos. 96-50847, 96-50948 (July 22, 1997).

B. *Ghiglieri v. Ludwig*, Opinion of the United States Court of Appeals for the Fifth Circuit, Case No. 96-10818 (October 29, 1997).

C. *Ghiglieri v. Sun World National Association*, Memorandum Opinion and Order, United States District Court for the Northern District of Texas (October 29, 1996).

D. *Ghiglieri v. Ludwig*, Findings of Fact and Conclusions of Law of the United States District Court for the Western District of Texas (May 22, 1996).

E. Decision of the Office of the Comptroller of the Currency on the Applications of Sun World, National Association, El Paso, Texas (August 2, 1996).

F. Decision of the Office of the Comptroller of the Currency on the Applications of Commercial National Bank of Texarkana, Texarkana, Arkansas (March 8, 1995).

G. Denial of Petition for Rehearing and Suggestion for Rehearing En Banc, United States Court of Appeals for the Fifth Circuit (September 25, 1997).

H. 12 U.S.C. § 36.

I. ARK. CODE ANN. § 23-32-1202 (Michie 1994).

J. N.M. STAT. ANN. § § 58-1C-4, 58-1C-5, 58-1C-6, 58-1C-7, 58-1C-8 (1996).

K. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, [H.R. 3841] (later, Pub. L. No. 103-328, 108 Stat. 2338 (September 29, 1994)).

L. Joint Explanatory Statement of the Committee of Conference, H.R. CONF. REP. NO. 651, 103d Cong., 2d Sess. 47 *et seq.* (Aug. 2, 1994).

M. Prepared Statement of Chairman D'Amato before Financial Institutions Subcommittee (May 1, 1997).

N. Affidavit of James J. Saxon.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 3841) to amend the Bank Holding Company Act of 1956, the Revised Statutes of the United States, and the Federal Deposit Insurance Act to provide for interstate banking and branching, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

SUMMARY OF MAJOR PROVISIONS

Title I -- Interstate Banking and Branching

Interstate Banking

The legislation permits bank holding companies to acquire banks in any State one year after enactment of the legislation. State laws which require the acquiring company to acquire a bank that has been in existence for a specified minimum period of time (not to exceed five years) are preserved. Any State law which requires a bank to be acquired to be in existence for more than five years applies as if it requires that the bank being acquired be five years old.

Section 3(d)(1)(D) of the Bank Holding Company Act, as amended by section 101, protects the applicability of a State law that makes the acquisition of a bank contingent upon a requirement that a portion of the bank's assets be available to a

State-sponsored housing entity established under State law, under the conditions that the State law is not discriminatory, that the State law was in effect as of the date of enactment of this Act, and that compliance with the State law would not result in an unacceptable risk to the deposit insurance fund and would not place the bank in an unsafe or unsound condition.

The Federal Reserve Board may not approve an interstate acquisition if, as a result of the acquisition, the bank holding company would control more than 10 percent of the total amount of deposits of insured depository institutions in the United States or 30 percent or more of the deposits in the home State of the bank to be acquired. Notwithstanding the 30 percent limit, the Board could approve such a transaction if the home State waives the 30 percent limit either by statute, regulation, or order of the appropriate State official based on standards that do not have the effect of discriminating against out-of-State institutions.

The above concentration limits do not apply to initial entry into a State by a bank holding company. If, however, a State has a deposit concentration cap which applies in a non-discriminatory manner to both in-State and out-of-State bank holding companies making initial entry acquisitions, then nothing in the legislation affects the State's authority to impose such deposit cap.

Community Reinvestment Laws

The Board shall continue to comply with its responsibilities under the Community Reinvestment Act of 1977, with respect to applications under section 3(d) of the Bank Holding Company Act of 1956. Currently the Board reviews applications under section 3(d) in accordance with existing

regulations (such as Regulations Y and BB) and practices, and the conferees intend that nothing in this bill will alter or affect such regulations and practices as established by the Board.

In acting on an application under section 3(d), the Board shall also consider the applicant's record of compliance with applicable State community reinvestment laws.

Applicability of Antitrust Laws

The title provides that no provision of the antitrust laws is to be construed as being affected by the interstate banking amendments to the Bank Holding Company Act, including the act's provisions on concentration limits. The applicability, if any, of State antitrust laws is likewise preserved. Nothing in this provision is intended to affect or expand the existing applicability of State antitrust laws, under current statutory or case law, to interstate acquisitions.

STATE TAXATION AUTHORITY

Section 101(l) amends the Bank Holding Company Act of 1956 to provide that nothing in that Act shall be construed as affecting the authority of any State or political subdivision to adopt, apply or administer any tax or method of taxation to any bank, bank holding company or foreign bank, or their affiliates, to the extent that such tax or tax method is otherwise permissible under the Constitution or other Federal law. This is intended to clarify that it is not the Conferees' intent to overturn existing State tax law pertaining to distinct legal entities within a corporate structure. The provision recognizes the existence of corporate affiliates and reaffirms that States may segregate the separately incorporated entities within a bank or bank holding company for State taxation purposes, to the extent permissible

under the Constitution or other Federal law.

"Similar amendments are made to section 44 of the Federal Deposit Insurance Act and to Title I.

AFFILIATED BANKS AS AGENTS

The Conferees accepted a modified version of a provision in the House bill permitting certain affiliated depository institutions to act as agents for each other for purposes of receiving deposits, renewing time deposits, closing loans, servicing loans and receiving payments on loans and other obligations for other affiliated depository institutions, with several amendments.

The modified provision permits bank subsidiaries, rather than depository institution subsidiaries, of bank holding companies to act as agents for depository institution affiliates. Subject to certain conditions, insured savings associations which were affiliated with banks as of July 1, 1994, may act as agents for such banks under this provision.

As used in this provision, the term "receive deposits" means the taking of deposits to be credited to an existing account and is not meant to include the opening or origination of new deposit accounts at an affiliated institution by the agent institution.

The Conferees deleted the authority in the House bill for affiliated depository institutions to disburse the proceeds of loans for other affiliated depository institutions and substituted authority to service loans. The Conferees intend that, under this authority to service loans, agent banks may perform ministerial functions for the principal bank making a loan. Those ministerial functions include such activities as providing loan applications, assembling documents, providing a location for

returning documents necessary for making the loan, providing loan account information (such as outstanding loan balances), and receiving payments. It does not include such loan functions as evaluating applications or disbursing loan funds. The term "close loans" does not include the making of a decision to extend credit or the extension of credit.

The Conferees also intend that the provision permit affiliated banks to act as agents for one another regardless of whether the institutions are located in the same or different [s]tates.

Under section 18(r)(3) of the Federal Deposit Insurance Act (as added by section 101(d) of this title), a bank may not conduct any activity as an agent that such bank is prohibited from conducting as principal under applicable Federal or State law. Prohibited activities under this provision include activities by a bank acting as agent that would be prohibited to the bank acting as principal under the applicable consumer protection, powers and other laws of the State where the bank is situated. The Conferees intend that the limitation on acting as agent under section 18(r)(3) shall also be applied to all United States offices of foreign banks covered under the definition of bank in the Act, when acting as agent for a depository institution affiliate. Agency relationships may be used to promote operational efficiencies, but they may not be used to evade applicable consumer protection, powers, and other laws of the Sate where the agent institution is situated.

The Conferees also intend to clarify, through the addition of a savings clause, that this section does not affect the authority of a depository institution to be an agent for a depository institution under any other provision of law, nor does it affect a determination under any other provision of law

whether the agent should be considered to be a branch of the depository institution. The Conferees do not intend that new subsection 18(r) of the Federal Deposit Insurance Act affect the application of other provisions of law which permit agency relationships between affiliated depository institutions. The Conferees note that subsection 18(r) applies narrowly only to affiliated depository institutions acting as agents, and has no application to agency relationships concerning non-depositories as agent, whether or not affiliated with the depository institution.

Section 18(r) shall not be construed as authorizing transactions which result in the transfer of any insured depository institution's Federal deposit insurance from one Federal deposit insurance fund to the other Federal deposit insurance fund.

INTERSTATE BRANCHING

Introduction

The Conferees decided on an interstate branching structure somewhat different than the structure of either the House or the Senate bills. Under the House structure, branching (other than the establishment of de novo branches) was permitted three years after enactment through a one-step acquisition of an existing bank and its conversion to branches of the acquiring bank, under the National Bank Act for national banks or the Federal Deposit Insurance Act for State banks. The Senate structure used a two-step process effective June 1, 1997, with the interstate acquisition of a bank under the Bank Holding Company Act of 1956 subsequently followed by a consolidation of the newly acquired bank with another bank owned by the holding company.

The Conferees adopted a structure under which a bank would engage in a merger transaction with the out-of-State bank and convert any of its offices into branches of the resulting bank under the authority of a new section of the Federal Deposit Insurance Act. Such a transaction would be subject to approval under the Bank Merger Act.

The House bill authorized bank holding companies to consolidate affiliated banks into a single bank with interstate branches 18 months after enactment of the legislation. The Senate bill did not provide for early consolidation. The House receded to the Senate, thereby permitting consolidation of affiliated banks in different States through an interstate merger transaction when interstate branching takes effect on June 1, 1997.

Once a bank has established branches in a host State through an interstate merger transaction, such bank may establish and acquire additional branches at any location in the host State where any bank involved in the interstate merger transaction could have established or acquired branches under applicable Federal or State law.

Interstate Branching Through Mergers

Beginning June 1, 1997, a bank may merge with a bank in another State so long as both States have not opted out of interstate branching between the date of enactment and May 31, 1997. States may enact laws opting-out of interstate branching before June 1, 1997, subject to certain conditions. States may also enact laws permitting interstate merger transactions before June 1, 1997. Host States may impose conditions on a branch resulting from an interstate merger transaction that occurs before June 1, 1997, if the conditions do not discriminate against out-

of-State banks, are not preempted by Federal law, and do not apply or require performance after May 31, 1997.

State laws requiring out-of-State banks or bank holding companies to merge with, or acquire a bank that has been in existence for a specified minimum period of time (not to exceed five years) are preserved with respect to interstate merger transactions. Any such State law which imposes a minimum age requirement of more than five years on a bank to be acquired is to be applied as if the minimum age requirement is five years.

Any bank that files an application for an interstate merger transaction shall comply with any filing requirement of any host State of the bank resulting from the transaction, to the extent the requirement does not discriminate against out-of-State banks or bank holding companies, and is similar to any requirement imposed on non-banking corporations incorporated in another State that engage in business in the host State. Banks must also file a copy of the application for the interstate merger transaction with the State bank supervisor of the host State. The responsible agency may not approve an application if the applicant materially fails to comply with the host State's filing requirements.

The responsible agency may not approve an application for an interstate merger if the resulting bank would control more than 10 percent or more of the total amount of deposits of insured depository institutions in the United States or 30 percent or more of the deposits in any State affected by the interstate merger. Notwithstanding the 30 percent limit, the responsible agency could approve a transaction if the home State waives the 30 percent limit either by statute, regulation, or order of the appropriate State official based on standards that do not have the effect of discriminating against out-of-State institutions.

The concentration limits do not apply with respect to any interstate merger transactions involving affiliated banks. The concentration limits also do not apply to initial entry into a State by a bank or its affiliates. If, however, a State has a deposit concentration cap which applies in a non-discriminatory manner to both in-State and out-of-State banks and bank holding companies, then nothing in the legislation affects the State's authority also to impose such deposit caps to initial entries.

The responsible agency may approve an application for a merger only if each bank involved in the transaction is adequately capitalized as of the date the application is filed, and the agency determines that the resulting bank will continue to be adequately capitalized and adequately managed.

The laws of the host State regarding community reinvestment, consumer protection (including applicable usury ceilings), fair lending, and establishment of intrastate branches shall apply to any branch of a national bank in the host State to the same extent as such State laws apply to a branch of a bank chartered by that State, except when Federal law preempts, or when the Comptroller determines that the law has a discriminatory effect on the branch in comparison to branches of State-chartered banks. Such laws shall be enforced by the Comptroller of the Currency.

Acquisition of Branches

New Section 44(a)(4)(A) of the Federal Deposit Insurance Act (as added by section 102(a)) permits the responsible Federal regulator to approve the acquisition of a branch of an insured bank without the acquisition of the entire bank only if the law of the State in which the branch is located permits out-of-State banks to acquire a branch of a bank without

acquiring the bank. The Conferees intend that, in approving such acquisitions, Federal regulators will ensure that State minimum age restrictions under paragraph (5) which apply to such acquisitions are preserved. Federal banking agencies should not approve the acquisition of a branch (if permitted under paragraph (4)) in host States which have minimum age laws regarding the acquisition of banks, unless such laws expressly permit branches in the host State to be acquired without the acquisition of the bank.

Applicability of Community Reinvestment Laws

Under current law, most interstate movement by banking organizations takes place via the Bank Holding Company Act. Current regulations and practices of the Board of Governors of Federal Reserve System delineate the scope of CRA performance considered by the Board in acting on applications by a bank holding company to move interstate via section 3(d) of the Bank Holding Company Act.

Section 44(b)(3) of the Federal Deposit Insurance Act (as added by section 102(a) of this title) provides that, only with respect to initial entry into a host State by a bank without branches or a bank affiliate in that host State, the scope of CRA performance considered by the responsible Federal banking agency in connection with an interstate branching application will parallel the scope of CRA performance which would be considered by the Board of Governors of the Federal Reserve System (to the same extent as outlined in the statement of managers accompanying section 3(d)(3) of the Bank Holding Company Act of 1956, as amended by section 101(a) of this title) if the application were for an interstate bank holding company acquisition pursuant to section 3(d) of the Bank

Holding Company Act. Hence, in those cases of initial entry, the Conferees intend that the responsible federal banking agency comply with its responsibilities under section 804 of CRA consistent with current regulations and practices with respect to bank mergers and also to take into account the CRA record, including the most recent written evaluation, of any affiliate banks of the resulting bank.

With respect to all other interstate branching applications apart from those involving initial entry into a host State, the responsible Federal banking agency shall carry out its responsibilities under section 804 of the Community Reinvestment Act consistent with its current regulations and practices with respect to bank mergers.

In all cases, when taking into account the CRA performance of an institution with branches in more than one State in connection with acting on an interstate branching application, the Conferees expect that the responsible Federal banking agency will take into account the institution's performance under CRA in each State in which it maintains branches.

In addition, when acting on an interstate branching application, the responsible Federal banking agency shall take into account the records of compliance with applicable State community reinvestment laws of any applicant bank.

Applicable State Law

States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses, and

communities. Federal banking agencies, through their opinion letters and interpretive rules on preemption issues, play an important role in maintaining the balance of Federal and State law under the dual banking system. Congress does not intend that the Interstate Banking and Branching Efficiency Act of 1994 alter this balance and thereby weaken States' authority to protect the interests of their consumers, businesses, or communities.

Accordingly, the title emphasizes that a host State's laws regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches will apply to interstate branches of national banks established in the host State to the same extent as those laws apply to a branch of a State bank, except when Federal law preempts application of the State laws to a national bank, or when the Comptroller of the Currency determines that the State laws have a discriminatory effect on the branch as compared with their effect on a branch of a State bank.

Under well-established judicial principles, national banks are subject to State law in many significant respects. The laws of the State in which a national bank is situated will apply to the national bank unless those State laws are preempted by Federal law. Generally, State law applies to national banks unless the State law is in direct conflict with the Federal law, Federal law is so comprehensive as to evidence Congressional intent to occupy a given field, or the State law stands as an obstacle to the accomplishment of the full purposes and objectives of the Federal law. In this regard, the impact of a State law on the safe and sound operations of a national bank is one factor that may be taken into account in considering whether Federal law preempts State law. Courts generally use a rule of construction that avoids finding a conflict between the Federal and State law

where possible. The title does not change these judicially established principles.

During the course of consideration of the title, the Conferees have been made aware of certain circumstances in which the Federal banking agencies have applied traditional preemption principles in a manner the Conferees believe is inappropriately aggressive, resulting in preemption of State law in situations where the Federal interest did not warrant that result. One illustration is OCC Interpretive Letter No. 572, dated January 15, 1992, from the OCC to Robert M. Jaworski, Assistant Commissioner, State of New Jersey Department of Banking, concluding that national banks in New Jersey are not required to comply with the New Jersey Consumer Checking Account Act. It is of utmost concert to the Conferees that the agencies issue opinion letters and interpretive rules concluding that Federal law preempts State law regarding community reinvestment, consumer protection, fair lending, or establishment of intrastate branches only when the agency has determined that the Federal policy interest in preemption is clear. In the case of Interpretive Letter No. 572, it is the sense of the Conferees that the fact the Congress has acknowledged the benefits of more widespread use of lifeline accounts through the enactment of the Bank Enterprise Act did not indicate that Congress intended to override State basic banking laws, or occupy the area of basic banking services to such an extent as to displace State laws, or that the existence of State basic banking laws frustrated the purpose of Congress.

The Conferees have similar concerns regarding the scope of the OCC interpretive rule that appears at 12 C.F.R. § 7.8000, which broadly asserts that Federal law governing the deposit-taking functions of national banks preempts any State law that

attempts to prohibit, limit, or restrict deposit account service charges. In light of the Conferees' views regarding the proper application of recognized preemption standards discussed above, the Conferees urge the OCC to review Interpretive Ruling 7.8000 to determine if it should be withdrawn or revised.

The Conferees understand that in certain cases some states have imposed conditions on, or obtained commitments from, bank holding companies in connection with a company's acquisition of banks outside its home State. The title provides that such conditions or commitments existing as of the date of enactment of the Interstate Banking and Branching Efficiency Act of 1994 will continue to be enforceable against the bank holding company or an affiliated successor company to the same extent as they were previously if a bank holding company with bank subsidiaries in more than one State chooses to combine its banks under new section 44 of the Federal Deposit Insurance Act (as added by section 102(a) of this title). The title does not create any new State enforcement authority with respect to any conditions imposed or commitments made before the enactment of the title.

Interpretations Concerning Federal Preemption of State Law

In view of the Congressional concern regarding preemption of State law regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches, the Conferees concluded that a more open process for reaching preemption conclusions in these areas, with a clearly structured, meaningful opportunity for interested parties to communicate their views to the agency, was warranted. Also, it is important that the agencies make their determinations on Federal preemption of State law available to the public in a

timely and accessible manner. Accordingly, the title imposes certain procedural requirements on agency preemption opinion letters and interpretive rules in connection with State laws regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches, whether or not related to interstate branching. The Conferees believe that the public notice and openness provided by the new process will be a vital safeguard to ensure that an agency applies the recognized principles of preemption, discussed above, in a balanced fashion.

The title provides that before issuing any opinion letter or interpretive ruling concluding that Federal law preempts State law regarding community reinvestment, consumer protection, fair lending, or establishment of intrastate branches, the appropriate Federal banking agency will publish notice in the Federal Register of the request, or of the agency's intention on its own motion, to determine whether Federal law preempts a particular State law. The notice should describe each State law in question and otherwise provide information sufficient to enable interested parties to comment meaningfully on the issue under consideration. The agency also should promptly make available upon request a copy of any incoming request letter. The title also requires the agency to publish in the Federal Register a copy of the final opinion letter or interpretive rule.

The Federal Register publication requirement is intended to provide readily available and widespread notice to interested parties of the opportunity to comment on preemption matters that have not been previously resolved by the agency or courts. The title requires the agency to give interested parties not less than 30 days in which to submit comments. In establishing the length of the comment period, the Conferees intend that the agencies should take into account the complexity of the preemption issue

involved and the number of parties likely interested in responding to the solicitation of public comment and the resources of those parties. The Conferees also expect the agencies to be flexible in extending the comment period if requested to do so by an interested party for good cause shown. The title further requires the agency to take the public comments into account in reaching its decision, even though each particular comment need not be specifically discussed in the final product.

This process is not intended to confer upon the agency any new authority to preempt or to determine preemptive Congressional intent in the four areas described, or to change the substantive theories of preemption as set forth in existing law. Rather, it is intended to help focus any administrative preemption analysis and to help ensure that an agency only makes a preemption determination when the legal basis is compelling and the Federal policy interest is clear.

The public notice and comment process is not required when a particular request raises issues of Federal preemption of State law that are essentially identical to those previously resolved by the agency or the courts, or when the incoming request regarding preemption contains no significant legal basis upon which to make a preemption determination. The title also exempts materials prepared for use in judicial proceedings, for submission to Congress or a member of Congress, and for intra-governmental use from the new public notice requirements. The intra-governmental use exception, in particular, is intended to carve out an exception for materials provided to or from, or shared with, agency personnel or other agencies in the Executive Branch. Examples of the type of such material include, but are not limited to, memoranda, letters, correspondence, advisory opinions, or other materials that are part of the deliberative

process that governs the making of decisions and policies within the Executive Branch. An exception to the notice and comment provisions is also provided in cases when the appropriate Federal banking agency determines in writing that the exception is necessary to avoid a serious and imminent threat to the safety and soundness of a national bank.

The Comptroller must follow the notice and comment process in making any determination under section 5155(f)(1)(A)(ii) of the Revised Statutes that State laws discriminate against a branch of a national bank as compared with a branch of a State bank.

The Conferees expect that the Federal banking agencies will be receptive to well-supported requests from interested parties seeking reconsideration of previous interpretive rules or opinions regarding State community reinvestment, consumer protection, fair lending and intrastate branching laws, consistent with the approach to preemption discussed above.

Host State Notification Requirements

Host States may impose any notification or reporting requirement on a branch in the State if the requirement does not discriminate against out-of-State banks and is not preempted by Federal law. Such requirement is in addition to the filing requirement for individual transactions.

State Opt-Out of Interstate Branching

Section 44(a)(2) of the Federal Deposit Insurance Act (as added by section 102(a)) provides that States may opt out of interstate branching by enacting legislation after the date of enactment of the title and before June 1, 1997. If a State opts-out, no bank in any other State may establish a branch in that

State, either through an acquisition or de novo. A bank whose home State opts-out of interstate branching may not participate in any interstate merger transaction.

Interstate Branching De Novo with State Authorization

The appropriate Federal regulator may approve an application by a bank to establish and operate a de novo branch in a State in which the bank does not maintain a branch if a State opts-in to de novo branching, and expressly permits de novo branching. The establishment of the initial branch in a host State which permits de novo interstate branching is subject to the same requirements which apply to the initial acquisition of a bank in the host State, other than the deposit concentration limits. Those limits are inapplicable to de novo entry since, by definition, the bank would not control any deposits in the host State at the time of entry.

Once a bank has established a branch in a host State by de novo branching such bank may establish and acquire additional branches at any location in the host State in the same manner as a bank could have established or acquired under applicable Federal or State law.

Exclusive Means of Interstate Branching

The Conferees adopted provisions to assure that the comprehensive framework for interstate branching established by Title I will, when the provisions take effect, be the exclusive means for national and State banks to enter new States with interstate branches.

Paragraphs (2) and (3) of section 102(b) amend the National Bank Act and the Federal Deposit Insurance Act, respectively, to state that when the interstate merger and

branching provisions take effect, initial interstate entry into a host State may, with exceptions for certain emergency situations, occur only in accordance with this legislation. These provisions will assure that the conditions and safeguards which accompany initial interstate branching will apply to the establishment of interstate branching networks at the time those provisions take effect.

The Comptroller of the Currency (OCC) has used the 30-mile relocation provision of the National Bank Act (section 2 of the Act of May 1, 1886, 12 U.S.C. 30), to approve several transactions which have permitted national banks to move their main offices to other States but to retain branches in the States left by the main offices. Section 102(b)(2) amends the provision so that after June 1, 1997, a national bank relocating its main office to another State may maintain its branches in the first State only if those branches could have been established by a bank with its home State in the new State. However, along with the OCC's approval for the relocation, the bank would be required to obtain the Comptroller's approval under section 5155 of the Revised Statutes to continue to operate any remaining branch offices located in State other than the State of its new main office. Thus, the bank would be required to file a consolidated application with the OCC covering both aspects of the transaction; the OCC would be authorized to act on the remaining out-of-State branch aspect of the transaction only pursuant to section 5155. State banks are treated in a similar manner.

The Conferees are aware of the OCC procedures in permitting relocation across State lines. The Conferees concur with those procedures, including the application of appropriate State law and authority. The Conferees expect the OCC to

continue to follow those procedures until the provisions of Title I become fully applicable on June 1, 1997.

Banks that have moved their main offices pursuant to 12 U.S.C. 30 should not be treated differently than other banks with their main offices in that State. Specifically, for purposes of section 3(d) of the Bank Holding Company [Act], and sections 5(d)(3) and 18(c) of the Federal Deposit Insurance Act, such banks shall be able to make acquisitions and establish branches in the State to which their main office is relocated to the same extent as any other bank with its main office in that State.

AMENDMENT TO THE HOME OWNERS LOAN ACT

The amendment made to the Home Owners Loan Act by section 102(b)(5) of the bill overturns an interpretation of that Act in *First Gibraltar Bank* v. *Morales*, (5th Cir., Dkt. 93-8170, decided April 29, 1994). In the case the United States Court of Appeals for the Fifth Circuit held that the Office of Thrift Supervision had the authority to issue a regulation preempting a provision in the Texas Constitution protecting homesteads of consumers in the State.

This amendment clarifies that neither the Home Owners Loan Act nor any other provision of law provides the Director of the Office of Thrift Supervision with the authority, through regulation or otherwise, to preempt Texas law in the area of homestead protection. By extension, housing creditors under the Alternative Mortgage Transaction Parity Act who were impacted by the decision in the *First Gibraltar* case also continue to be subject to Texas law in the area of homestead protection.

PROVISIONS RELATING TO DIRECT BRANCHES

OF FOREIGN BANKS

Establishment of Direct Branches of a Foreign Bank Outside the Foreign Bank's Home State

Under the House bill, section 5(a) of the International Banking Act of 1978 (IBA) was amended to permit a foreign bank to establish and operate State-licensed branches, either de novo or by acquisition and merger, in any State outside its home State to the same extent that a bank chartered by the foreign bank's home State may establish such branches de novo or by acquisition and merger, respectively. A parallel provision allowed a foreign bank to establish and operate Federally-licensed branches in any State outside its home State to the same exten[t] that a national bank from the foreign bank's home State may do so. In addition, the House bill restates the provision of current law that allows a State to permit foreign banks to establish agencies or limited branches that accept only such deposits as are permissible for a corporation organized under section 25A of the Federal Reserve Act to accept.

The Senate bill did not amend the IBA. As a result, the Senate bill permitted foreign banks to engage in interstate branching only if they first established or acquired a bank in the United States and then followed the same procedures applicable to U.S. banks. The Senate adopted its approach to address its concern that the wholesale direct branches of foreign banks enjoy competitive advantages over U.S. banks because such branches are not subject to the Community Reinvestment Act or to deposit insurance coverage and assessments.

The Conferees agreed to adopt the House structure regarding foreign banks. However, in order to address concerns regarding a level playing field between wholesale direct branches of foreign banks and domestic banks, the Conferees added

provisions regarding: (a) continued application of CRA requirements to a direct branch resulting from an initial interstate entry by acquisition of a regulated financial institution[;] (b) revision of the regulations governing the types of deposits that may be accepted by uninsured direct branches of a foreign bank; (c) types of activities at offshore shell branches managed and controlled by U.S. branches and agencies of foreign banks; and (d) application of consumer protection laws to direct branches of foreign banks. These provisions are among those described below.

Requirement for a separate subsidiary. Section 5(a) of the IBA is amended to provide that the Federal Reserve Board or the Comptroller of the Currency may require a foreign bank to establish a separate U.S. subsidiary bank in order to engage in interstate branching if the Board or the Comptroller finds that it is the only way to verify that a foreign bank adheres to capital requirements that are equivalent to those applicable to a U.S. bank engaged in interstate branching.

Continued application of CRA requirements to a direct branch resulting from an initial interstate entry by acquisition of a regulated financial institution. The Conferees added section 5(a)(8) to the IBA to provide that in cases where a foreign bank acquires a bank or a branch of a bank, in a State in which the foreign bank does not maintain a branch, and such acquired bank was, or was part of, immediately prior to the acquisition, a regulated financial institution as defined in the Community Reinvestment Act (CRA), the CRA shall continue to apply to each branch of the foreign bank which results from the acquisition as if such branch were a regulated financial institution. The Conferees note that the requirements of section 6(c) of the IBA will still apply. The requirements of section

5(a)(8) would not apply in the case of a branch that results from such acquisition that accepts only such deposits as are permissible for a corporation organized under section 25A of the Federal Reserve Act to accept.

Continued authority for branches, agencies and commercial lending companies established prior to this Act. Section 5(b) of the IBA is amended to include a provision that permits foreign banks that lawfully established and operated interstate branches, agencies or commercial lending company subsidiaries before the date of enactment of this Act to continue to operate such offices or subsidiaries after the enactment of this Act.

Determining home State of foreign bank. Section 5(c) of the IBA is amended to provide that any foreign bank that operates a branch, agency, subsidiary commercial bank or commercial lending company must have a home State.

Clarification of direct branching rules in the case of a foreign bank with a domestic bank subsidiary. Section 5(d) is added to the IBA to clarify that a foreign bank may establish direct branches and agencies on an interstate basis and also own or control a U.S. subsidiary bank, and that a national or State subsidiary bank of a foreign bank may acquire, establish or operate branches outside its home State to the same extent as any other national or State bank, respectively, from the subsidiary bank's home State.

Deposits That May Be Accepted by Uninsured Direct Branches of Foreign Banks

Revision of regulations governing types of deposits that may be accepted by uninsured direct branches of foreign banks. The IBA was amended in 1991 to prohibit a foreign bank from

establishing any new branches which take domestic retail deposits that have balances of less than $100,000 and require deposit insurance. As a result, a foreign bank must establish a U.S. subsidiary bank in order to conduct a domestic retail deposit-taking business. Regulations issued by the Federal Deposit Insurance Corporation (FDIC) and the Comptroller of the Currency under section 6 of the IBA govern the types of deposits that may be accepted by uninsured direct branches of foreign banks. To address concerns that these regulations may permit such branches to engage to some extent in domestic retail deposit-taking activity, in regard to which they are not subject to FDIC insurance coverage and assessments or to the requirements of the Community Reinvestment Act, the Conferees added a requirement that the FDIC and the Comptroller revise their regulations to ensure that foreign banking organizations do not receive an unfair competitive advantage over U.S. banking organizations.

In reviewing their regulations in accordance with this subsection, the agencies must consider whether to permit the acceptance of initial deposits of less than $100,000 only from specified types of customers. As part of this revision, the agencies must reduce -- from five percent of average branch deposits to no more than one percent -- the exemption that allows such branches to accept initial deposits of less than $100,000 from any party on a de minimis basis. In carrying out this revision, the agencies must take into account the importance of maintaining and improving the availability of credit to all sectors of the U.S. economy, including the international trade finance sector of the U.S. economy. The agencies must publish final regulations no later than twelve months after the date of enactment of this Act, and may establish reasonable transition

rules to facilitate any termination of any deposit-taking activities that were previously permissible.

Treatment of FDIC-insured banks chartered in Puerto Rico, Guam, American Samoa, Virgin Islands and U.S. territories. Section 6(d) of the IBA is amended to clarify that banks insured by the FDIC and chartered in any territory of the United States, Puerto Rico, Guam, American Samoa or the Virgin Islands are not included as foreign banks for purposes of the requirement to establish a banking subsidiary to engage in a domestic retail deposit-taking business. This provision clarifies that such insured banks (which are also subject to CRA requirements) are to be treated like any other FDIC-insured bank for purposes of acceptance of retail deposits and are therefore not subject to the provisions of section 6(c).

Types of Activities at Offshore Shell Branches Managed and Controlled by U.S. Agencies and Branches of Foreign Banks

U.S. banking agencies do not regulate or supervise the activities of offshore shell branches of foreign banks, even if such branches are managed and controlled by U.S. agencies and branches of foreign banks. The Conferees wanted to avoid any potential for a foreign bank to use its U.S. branches or agencies to manage types of activities through offshore shell branches that could not be managed by a U.S. bank at its foreign branches or subsidiaries.

To address this concern, the Conferees added section 7(k) to the IBA to provide that a U.S. branch or agency of a foreign bank may not, through an offshore shell branch that it manages or controls, manage types of activities that a U.S. bank is not permitted to manage at a foreign branch or subsidiary. Any regulations promulgated to carry out this section must be

promulgated in accordance with section 13 of the IBA and must be uniform, to the extent practicable.

Other Foreign Bank Provisions

Application of consumer protection laws to direct branches of foreign banks. Section 9(b) of the IBA is amended to affirm that direct branches and agencies of foreign banks and commercial lending company subsidiaries are, by various statutory provisions, subject to the following consumer protection laws: Electronic Funds Transfer Act, Equal Credit Opportunity Act, Expedited Funds Availability Act, Fair Credit Billing Act, Fair Credit Reporting Act, Fair Debt Collection Practices Act, Home Mortgage Disclosure Act, Real Estate Settlement Procedures Act, Truth in Lending Act, Truth in Leasing Act, and Truth in Savings Act.

Foreign bank examination fees. Sections 7(c) and 10(c) of the International Banking Act state that the Federal Reserve Board shall assess the cost of any examination of a branch, agency or representative office of a foreign bank against the foreign bank. The conference report provides a three-year moratorium on any assessments under these sections.

COORDINATION OF EXAMINATION AUTHORITY REGARDING INTERSTATE BRANCHES

Section 105 permits the appropriate State bank supervisor of a host State to examine branches of out-of-State banks to assure compliance with host State laws, including those governing banking, community reinvestment, fair lending, consumer protection and permissible activities, and to assure that the activities of the branch are conducted in a safe and sound manner.

The host State bank supervisor, or other host State law enforcement officer (if authorized under host State law) may take appropriate enforcement actions and proceedings regarding the branch.

State bank supervisors are permitted to enter into cooperative agreements to facilitate supervision of State banks operating interstate. Under the Senate-passed bill, such agreements would have been subject to approval of the appropriate Federal regulator. The House-passed bill had no requirement for approval. The Senate receded to the House on this issue. Both bills contained a provision that nothing in the section affected the authority of Federal banking agencies to examine branches of insured depository institutions, and the Conferees enclosed such a provision in the title.

BRANCH CLOSURES

The House-passed bill added a new section 42(d) to the Federal Deposit Insurance Act, setting forth a procedure for notice, comment, consultation with community leaders and a meeting of representatives of the appropriate Federal banking agency whenever an interstate bank proposes closing a branch in a low- or moderate-income area. The Senate-passed bill contained no comparable provision.

The House provision was amended by the Conferees to specifically include other interested agencies in the required meeting in order to include the National Credit Union Administration in the meetings for the purpose of exploring the development of the use of community development credit unions.

This section does not effect the authority of an interstate bank to close a branch, or the timing of the closing.

FEDERAL RESERVE BOARD STUDY ON BANK FEES

The Federal Reserve is required to conduct an annual survey of the fees charged by banks for retail banking services. Each report shall describe any national or State trends in the cost and availability of such services. Reports are required for seven years.

PROHIBITION AGAINST DEPOSIT PRODUCTION OFFICES

In order to assure that the new interstate branching authorities provided by the Interstate Banking and Branching Efficiency Act of 1994 do not result in the taking of deposits from a community without concern for the credit needs of that community, section 107 requires each appropriate Federal banking agency to promulgate regulations effective June 1, 1997, prohibiting interstate branches from being used as deposit production offices. The regulations are to include guidelines to ensure that each interstate branch is reasonably helping to meet the credit needs of the community in which the branch operates.

The Conferees do not intend that section 109 creates any additional regulatory or paperwork burdens for any institution.

The regulations must require that if the percentage of loans made by an out-of-State bank in the host State relative to the deposits taken by the out-of-State bank in the host State is less than half the average of such percentage for all host-State banks, the appropriate Federal banking agency shall review the loan portfolio of the bank and determine whether the out-of-State bank is reasonably helping to meet the credit needs of the community served by the bank in the host State. If the agency determines that it is not, it may order the branch to be closed and the bank which established the branch may not open to a new branch in that State, unless the bank provides reasonable

assurances to the agency that the bank has an acceptable plan that will reasonably help to meet the credit needs of the communities served by the bank in the host State.

In making such a determination, the appropriate Federal banking agency shall consider a number of factors including whether the branch was acquired as part of the purchase of a failed or failing depository institution; whether the branch was acquired under circumstances where there was a low loan-to-deposit ratio; whether the branch has a higher concentration of commercial and credit card lending; and the ratings received by the out-of-State bank in CRA evaluations.

This provision applies to new interstate branches of national banks, State banks, and foreign banks established pursuant to this title or any amendment thereto.

COMMUNITY REINVESTMENT ACT EVALUATION OF BANKS WITH INTERSTATE BRANCHES

For each insured institution that maintains branches in two or more States, the appropriate Federal banking agency must prepare a written evaluation (pursuant to sections 807(a), (b), and (c) of the Community Reinvestment Act) of the institution's overall CRA performance, along with separate written evaluations and ratings of the institution's CRA performance in each State in which it maintains branches. If an institution has branches in two States in a single multi-State metropolitan area, the agency will prepare a separate written evaluation of the institution's CRA performance within that metropolitan area, and adjust the State-by-State evaluations of the institution accordingly.

Each State-by-State evaluation is to present information separately for each metropolitan area (within that State) in which

the institution maintains one or more branches, and separately for the nonmetropolitan area of the State if the institution has at least one branch in such nonmetropolitan area.

RESTATEMENT OF EXISTING LAW

State Taxation Authority

Section 111(1) restates as part of Title I the provisions of section 7(b) of the Bank Holding Company Act of 1956, regarding State taxation authority. Section 111(2) states that nothing in the title shall be construed as affecting the existing authority of any State or political subdivision of any State to impose and maintain a non-discriminatory franchise or other non-property tax on any bank, branch or bank holding company.

Applicability of Section 5197 of the Revised Statutes and Section 27 of the FDI Act

Section 111(3) specifically states that nothing in Title I affects sections 5179 of the Revised Statutes or section 27 of the Federal Deposit Insurance Act. Accordingly, the amendments made by the Interstate Banking and Branching Efficiency Act of 1994 that authorize insured depository institutions to branch interstate do not affect existing authorities with respect to any charges under section 5197 of the Revised Statutes or section 27 of the Federal Deposit Insurance Act imposed by national or State banks for loans or other extensions of credit made to borrowers outside the State where the bank or branch making the loan or other extension of credit is located.

GAO REPORT ON DATA COLLECTION

The Conferees adopted a Senate provision requiring a General Accounting Office report no later than nine months after

enactment on existing requirements for insured depository institutions to collect and report deposit and lending data and determine what modifications are needed so that interstate branching results in no material loss of information important to regulatory or congressional oversight of insured depository institutions. The House-passed bill had no similar provision.

PREEMPTION OF ARKANSAS USURY CEILING AS IT APPLIES TO CERTAIN LOANS

The Conferees adopted a Senate-passed provision preempting Arkansas usury limit for Consolidated Farm and Rural Development Act loans, while providing the State with a three-year period in which to reenact its limitation. The House-passed bill had no similar provision.

FOR IMMEDIATE RELEASE:
Thursday, May 1, 1997
CONTACT: Richard Mills 202-224-0894

Prepared Statement of Chairman D'Amato
before Financial Institutions Subcommittee
May 1, 1997

"Mr. Chairman, thank you for allowing me to make these remarks and for holding this important oversight hearing on the Office of the Comptroller of the Currency (OCC) and its supervision of the national banking system.

"Mr. Chairman, while the Subcommittee will probably cover many subjects this morning, I want to emphasize one -- the Comptroller's campaign to aggrandize and centralize regulatory power in his agency. These efforts are undermining the dual banking system, threatening the primacy of state insurance regulation, and usurping the prerogatives of Congress.

"Here is a partial list of initiatives by the OCC to illustrate my concerns:

I. <u>Undermining the Dual Banking System</u>

"By actively recruiting state-chartered banks to convert to national bank charters, the OCC is undermining the dual banking system. I have heard from many colleagues and state bank regulators that the OCC has mounted an unprecedented, aggressive marketing effort to convince state-chartered banks to flip to a national charter. In addition, late last year, the

Comptroller blocked a legislative effort in this Committee to fix a technical problem in the Riegle-Neal Interstate Banking law that places state-chartered banks desiring to branch into other states at a distinct disadvantage to nationally chartered banks. The Comptroller is effectively threatening the continuation of the historic and constructive dual banking system.

II. Allowing Bank Operating Subsidiaries Unlimited Powers

"The Comptroller has adopted regulations to permit national banks to establish subsidiaries with the express intention of engaging in non-banking activities -- activities that are not permissible for a bank. The first application under these new rules is from a bank actively seeking to enter real estate development! Of all things, real estate development. As if we haven't learned anything from the mistaken policies of the S&L regulators in the 1980s. The Comptroller will hear much more about these rules from this Congress, I believe.

"The Comptroller is deliberately consolidating power within his agency by first approving new powers for national banks and then asserting the authority to regulate such activities. Insurance may be the best example of the Comptroller's penchant for seizing jurisdiction without the approval of Congress.

III. Pre-empting State Insurance Regulation

"For example, the OCC has stretched the ability of national banks to see insurance far beyond the "small town" provision in the law. In addition, he has divined that certain insurance products are not "insurance" under the National Bank Act. More recently, the OCC has permitted a Missouri-state-chartered bank to convert to a national bank and grandfather its

interest in two insurance agency subsidiaries. And now the Comptroller has apparently decided that the sale of insurance by national banks should not be subject to traditional state insurance and consumer protection regulation and he is threatening to preempt state insurance regulators.

"Mr. Chairman, Congress' default on its responsibility to modernize the financial system has apparently emboldened Mr. Ludwig to take the reins of reform into his own hands. I regard these attacks on the well-established and historic primacy of state insurance regulators and the dual banking system to be the most extreme examples of the OCC's attempts to seize control of regulatory power at the expense of sound public policy and state and federal legislators and regulators.

"I see an unwholesome and dangerous rivalry developing between bank regulators, the Fed and the OCC. As we have learned from the S&L crisis in the 1980s, good judgment can get clouded when regulators act like cheerleaders for their constituents. Congress created the OCC to regulate the institutions it charters, not to be an advocate or marketer for the charter to institutions outside its jurisdiction or to establish some competitive equilibrium for these institutions.

"Mr. Chairman, normally the regulators are entitled to great deference, especially our financial regulators. And they usually receive it from Congress and the courts. But, in my view, a pattern has been established by the Comptroller of the Currency which makes the presumption of deference inoperative. He has displayed a clear disregard for the limits of his authority, for other state and federal regulators and for the Congress. We

should and will not sit idly by while the Comptroller of the Currency attempts to unilaterally redesign the financial system and alter the state and federal regulatory framework established by Congress over the years.

"Above all, I am deeply troubled and concerned that the Comptroller of the Currency's aggressive actions may, once again, subject federally insured banks to excessive risks and expose the bank insurance funds, and therefore taxpayers, to unnecessary liability. Congress can never forget the lessons of the savings and loan crisis in the late 1980's.

"Mr. Chairman, it is my hope that this Congress will pass a comprehensive financial services bill and the Comptroller's actions can be considered in this context. At the same time, I believe the Comptroller's conduct requires legislation to strengthen the dual banking system and to fortify and codify the principle of 'functional regulation' at both the state and federal level. For this reason, I will introduce the 'Financial Products Regulatory Improvement Act of 1997.' The bill implements a system of a 'functional regulation.' Simply put, under this system, the SEC will regulate securities activities, bank regulators will regulate bank products and activities, and State insurance regulators will regulate insurance activities.

"In addition, I want to assure my colleagues that the Committee is working closely with our colleagues in the House to preserve the dual banking system by achieving enactment of legislation, by June 1, to remove the disincentive for state chartered banks to branch interstate. June 1 is the trigger date

for nationwide-interstate banking. This bill is moving through the House and we will act immediately upon its arrival."

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NATIONAL BANK AND TRUST COMPANY OF TRAVERSE CITY, a national banking association	)	
Plaintiff,	)	
v.	)	Civil Action No. 4038
THE EMPIRE NATIONAL BANK, a national banking association, and JAMES J. SAXON, Comptroller of the Currency of the United States,	)	
Defendants.	)	

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION

DISTRICT OF COLUMBIA, SS:

JAMES J. SAXON, being duly sworn, deposes and says:

1. I am the Comptroller of the Currency, duly appointed, qualified, and acting as said officer.

2. I have access to and control over all of the records of the Office of the Comptroller of the Currency.

3. The records of this Office relating to the Haddonfield National Bank, Haddonfield, New Jersey, disclose that said bank's application, dated January 13, 1960, to change the location of its main office from Haddonfield, New Jersey to Delaware Township, Camden County, New Jersey, and to retain as a branch its Haddonfield office, was reviewed by this Office. During that review, it was noted that the Camden Trust Company, a state-chartered bank, operated and maintained a branch office within the municipality of Haddonfield. It was concluded at that time that, although the change in location of the applicant bank's main office was permissible under 12 U.S.C. 30, it was questionable whether the applicant bank's Haddonfield office could be legally retained as a branch. The application was denied by this Office because, under the applicable branching law, the existence of a branch of the Camden Trust Company in Haddonfield precluded the establishment of a branch in that municipality by a bank the main office of which was located outside that municipality.

Subsequently, eight of Haddonfield National's nine directors, later joined by the ninth, as individuals, signed and filed an application for the incorporation of a new National Bank to be located in Delaware Township. Camden Trust Company filed objections to the application and by appearance before the Comptroller, voiced its protest. The Comptroller indicated his intention to approve the application for a new bank, whereupon Camden Trust Company filed an action challenging the Comptroller's authority to issue a certificate which would permit the establishment of the new bank in Delaware Township. The United States District Court for the District of Columbia granted summary judgment to the Comptroller and dismissed the complaint. On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the District Court. The opinion of the Court of Appeals is reported at Camden Trust Company v. Gidney, 301 F. 2d 521 (D.C. Cir. 1962), cert. den. 369 U.S. 886 (1962).

4. The application of The Empire National Bank to change the location of its main office form the village of Empire,

Leelanau County, to Traverse City, Grand Traverse County, Michigan and to retain its Empire office as a branch was received by this Office on February 16, 1961. In reviewing this application, it was noted by this Office that no other bank or banking office was established in the village of Empire. It was concluded at that time that the change in the location of the applicant's main office was permissible under 12 U.S.C. 30 and that the establishment and operation of a branch in the village of Empire was permissible under 12 U.S.C. 36c inasmuch as there was no other bank or banking office established and operating in the village of Empire.

5. Decisions on both of the foregoing applications were made by the then Comptroller of the Currency, Ray M. Gidney. Both applications involved a change in the location of a main office and the retention of the former main office as a branch. There was absolutely no question that the change of location of the main office was permissible under 12 U.S.C. 30 in both cases. In the Haddonfield case, it was decided by this Office that the retention of the Haddonfield office as a branch was not legally permissible because of the existence of a branch office of the

Camden Trust Company in the municipality of Haddonfield. In the Empire National case, it was decided by this Office that the retention of the Empire office as a branch was permissible since there was no other banking office established and operating in Leelanau County. I am satisfied that these administrative decisions were correct under the circumstances, and I state, unequivocally, that the decisions in these two cases would be the same if applications involving the same circumstances were presented to me.

James J. Saxon
Comptroller of the Currency

Subscribed and sworn to
before me this ____ day of
February, 1964.

_____

Notary Public

Supreme Court, U.S.
FILED
FEB 24 1998
CLERK

(6)

No. 97-1078

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1997

CATHERINE A. GHIGLIERI,
TEXAS BANKING COMMISSIONER,
Petitioner,

v.

EUGENE A. LUDWIG, COMPTROLLER OF THE CURRENCY;
SUN WORLD NATIONAL ASSOCIATION, EL PASO, TEXAS; AND
COMMERCIAL NATIONAL BANK OF TEXARKANA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT COMMERCIAL NATIONAL BANK OF TEXARKANA IN OPPOSITION

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20 pp

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit correctly held that the Comptroller of the Currency permissibly construed section 30(b) of the National Bank Act, 12 U.S.C., to allow a national banking association in a *bona fide* relocation of its main office from Texarkana, Arkansas, to Texarkana, Texas, a distance of less than 30 miles, prior to June 1, 1997 (the date certain amendments to the National Bank Act contained in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 became applicable), to retain the association's previously owned and operated branch banks located in the State of Arkansas.

Whether the United States Court of Appeals for the Fifth Circuit correctly held that the Comptroller of the Currency, pursuant to section 36(c) of the National Bank Act, 12 U.S.C., and the branch banking laws of the State of Arkansas, properly allowed a national banking association that relocated its main office to the State of Texas and retained its previously owned and operated branch banks in the State of Arkansas prior to June 1, 1997, to establish a new branch bank at the site of its former main office in the State of Arkansas.

PARTIES TO THE PROCEEDINGS

The petition accurately identifies the parties. Pursuant to Supreme Court Rule 29.6, Respondent Commercial National Bank of Texarkana states that its parent holding company is Commercial Bancshares, Inc., a one-bank holding company incorporated in the State of Arkansas.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Authorities iv

Statement of the Case 2

Reasons for Denying the Petition 4

A. CONGRESS WAS AWARE OF THE COMPTROLLER'S INTERPRETATION OF SECTION 30(b) WHEN IT PASSED THE RIEGLE-NEAL ACT 5

(1) Expansion of Banking Activities 5

(2) A Clear Expression of Congressional Intent 8

(3) No Conflict in the United States Courts of Appeals .. 11

B. THE ESTABLISHMENT OF A NEW BRANCH BANK AT THE SITE OF THE FORMER MAIN OFFICE OF THE BANK IS AUTHORIZED BY THE BRANCH BANKING LAWS OF THE STATE OF ARKANSAS 12

Conclusion 14

TABLE OF AUTHORITIES

CASES **Page**

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 3, 4

Ghiglieri v. Ludwig, 125 F.3d 941 (5th Cir. 1997)..... 1

Ghiglieri v. Sun World Nat'l Ass'n, 117 F.3d 309 (5th Cir. 1997) 3, 5, 10

Marion Nat'l Bank v. Van Buren Bank, 418 F.2d 121 (7th Cir. 1969) 11

NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995) 10

Ramapo Bank v. Camp, 425 F.2d 333 (3d Cir.), *cert. denied*, 400 U.S. 828 (1970) 12

ADMINISTRATIVE DECISIONS

Decision of the Office of the Comptroller of the Currency on the Applications of First Fidelity Bank, N.A., Pa., and First Fidelity Bank, N.A., N.J. (Jan. 10, 1994), *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,644 at 83,967..... 9

Decision of the Office of the Comptroller of the Currency on the Applications of American Security Bank, N.A., Washington, D.C., and Maryland Bank, Baltimore, Md. (February 4, 1994), *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,695, at 84,266 10

STATUTES

Arkansas Code Annotated § 23-32-1202(b)(2) 13

National Bank Act

12 U.S.C. §30(b) ..... i, 3-5, 7-8, 10-13

12 U.S.C. §30(c) 10, 12

12 U.S.C. §36(c) ..... i, 4-5, 11-12

12 U.S.C. §36(e) 10, 12

Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 4-12

OTHER AUTHORITIES

House Conference Report, Joint Explanatory Statement of the Committee of Conference, House Conf. Rep. No. 103-651, 5 U.S. Code Cong. & Admin. News, 103d Cong., 2d Sess. 2039-2089 (1994) 8

M. Indick and S. Kini, *The Interstate Banking and Branching Efficiency Act: New Options, New Problems*, 112 Banking L. J. 100 (1995) 7

M. Rollinger, *Interstate Banking and Branching Under the Riegle-Neal Act of 1994*, 33 Harv. J. on Legis. 183 (1996) 7

Overview of Proposed Rule and Comments, 62 Fed. Reg. 47,728-29 11

No. 97-1078

In the Supreme Court
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OCTOBER TERM, 1997

CATHERINE A. GHIGLIERI,
TEXAS BANKING COMMISSIONER,
Petitioner,

v.

EUGENE A. LUDWIG, COMPTROLLER OF THE CURRENCY;
SUN WORLD NATIONAL ASSOCIATION, EL PASO, TEXAS; AND
COMMERCIAL NATIONAL BANK OF TEXARKANA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT COMMERCIAL NATIONAL BANK OF TEXARKANA IN OPPOSITION

Commercial National Bank of Texarkana (the "Bank") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Catherine A. Ghiglieri, Texas Banking Commissioner (the "Texas Commissioner"), to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Ghiglieri v. Ludwig*, 125 F.3d 941 (1997) (Petitioner's Appendix ("Pet. App.")B).

STATEMENT OF THE CASE

The Bank is a small national banking association with about $92 million in assets and $82 million in deposits (Pet. App. F-1). The main office of the Bank is in Texarkana, Miller County, Arkansas (*Id.*). The Bank also operated three branch banks and an ATM in Miller County (*Id.*). The Texarkana metropolitan area is unusual in that the state line between Arkansas and Texas bifurcates the population. Because no natural boundary forms that dividing line, the ability of the Bank to operate in both Texas and Arkansas would make banking more convenient and accessible to all residents of the Texarkana area, whether they live or work in Texas or Arkansas (Respondent's Appendix ("Resp. App.") A-5-6). Also, areas of Texarkana, Texas, were experiencing a tremendous amount of construction and rapid growth (Resp. App. B-6). The Bank proposed to relocate its main office to that locale.

The solution to these inconveniences for residents and the response by the Bank to the opportunity seemed apparent. The Bank filed with the Comptroller of the Currency (the "Comptroller") two applications, both of which appeared routine in light of applications of other banks previously approved by the Comptroller. The first application sought to relocate the main office of the Bank from Arkansas to Texas and retain the branch banks in Miller County. (Pet. App. F-1). The proposed location in Texas was only two miles from the city limits of Texarkana, Arkansas (Pet. App. F-1). A permanent new main office in Texarkana, Texas, was to be constructed at a cost of about $1,500,000 (Pet. App. D-9, 10). The second application sought approval to establish a new branch bank at the location of the Bank's former main office in Arkansas (Pet. App. F-1). The Texas Commissioner and the Arkansas State Bank Department were notified of the applications, and both filed objections to the applications.

Relying on numerous prior approvals of other applications that presented virtually the same factual and legal scenarios, the Comptroller in March 1995 approved both of the Bank's applications (Pet. App. F-1). Because of the length of time necessary to construct the new facility in Texas, the Bank later applied to the Comptroller for approval to open a temporary main office in Texas (Resp. App. B-6). This request was approved by the Comptroller (Resp. App. B-1). The temporary main office was opened (Pet. App. D-10).

The Texas Commissioner instituted this action immediately after the Bank opened its temporary main office in Texas. The Arkansas Commissioner is not and has not been a party to this case. At oral argument before the district court, the Texas Commissioner withdrew her contention that the Bank could not relocate its main office across State lines within 30 miles distance from its former main office (Pet. App. D-18 n.8). The district court found that the temporary main office was not "a branch office in disguise" (Pet. App. D-18). The district court held, however, that retention of the Bank's Arkansas branches upon relocation of its main office to Texas was not in accordance with law and, based in large part on this erroneous conclusion, that the Bank could not establish a new branch bank at the location of its former main office in Arkansas (Pet. App. D-19-40). The district court set aside the Comptroller's decisions on the Bank's applications and enjoined the Bank's banking operations in Texas.

The Fifth Circuit reversed the district court. The court relied on this Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and its prior decision in *Ghiglieri v. Sun World Nat'l Ass'n*, 117 F.3d 309 (5th Cir. 1997), to defer to the Comptroller's permissible construction of section 30(b) of the National Bank Act to allow retention of the Bank's pre-existing

branches in Arkansas following the establishment of the new main office in Texas. The court next concluded under section 36(c) of that Act that Arkansas state branch banking law allowed the Bank to continue to use the site of its former main office as a branch bank in Arkansas.

REASONS FOR DENYING THE PETITION

The petition should be denied for the following reasons. The Comptroller applied section 30(b), 12 U.S.C., of the National Bank Act, which permits relocation of a national banking association's main office by up to 30 miles, to approve the Bank's relocation of its main office from Texarkana, Arkansas, to Texarkana, Texas (a distance of about 6 miles) (Resp. App. A-2). The Texas Commissioner conceded in the district court the propriety of this construction and application of section 30(b) (Pet. App. D-18 n.8). The Comptroller next permissibly construed section 30(b) to permit the Bank to retain the branch banks that it previously owned and operated in Arkansas and not to require divestiture of those branch banks upon relocation of the Bank's main office. The Fifth Circuit properly held that this construction was reasonable in the absence of clear Congressional intent in accordance with this Court's directive in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), of the proper analysis to apply in reviewing an agency's interpretation of the statute it administers.

The Comptroller's construction of section 30(b) was recognized by Congress in the course of its consideration of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (the "Riegle-Neal Act") (Pet. App. K). Previous consistent interpretations by the Comptroller of section 30(b) were explicitly approved for main office relocations and branch bank

retention occurring before June 1, 1997, at which time new limitations on the ability of a national banking association to retain its branches when relocating its main office became applicable. Thus, the decisions of the Fifth Circuit in this case and *Ghiglieri v. Sun World Nat'l Ass'n*, 117 F.3d 309, in which the Texas Commissioner also petitions for a writ, will not apply to relocations occurring after May 31, 1997.

No conflict of authority exists among the United States courts of appeals as to the Comptroller's interpretation of section 30(b). The only prior court of appeals decision in point reached the same result as did the Fifth Circuit in this case.

The Comptroller also properly applied section 36(c), 12 U.S.C., and Arkansas state branch banking law to allow the Bank to establish a new branch bank in the State of Arkansas at the site of its former main office. This determination was also upheld by the Fifth Circuit and requires nothing more than application of the banking laws of the State of Arkansas. The petition fails to challenge that determination.

A. CONGRESS WAS AWARE OF THE COMPTROLLER'S INTERPRETATION OF SECTION 30(b) WHEN IT PASSED THE RIEGLE-NEAL ACT

(1) **Expansion of Banking Activities**

The history of bank regulation in this country is essentially one of periods of great crisis leading to further expansion of the ability of banks to offer a greater number of services defined as banking and the geographic area in which those activities take place. Thus, the Civil War, the Depression, the oil and gas and real estate collapse of the '80s, and global economic competition all led to further expansion of the permissible activities of banks and the gradual expansion of the geographic area in which those activities take place.

P. Mulloy and C. Lasker, *The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994: Responding to Global Competition*, 21 J. Legis. 255, 256-257 (1995).

A recent Congressional reaction to the banking crisis of the '80s is the Riegle-Neal Act. Congress and most States have now approved a system that makes it possible for a single national bank with its main office in one State, having only one charter, to open branches in other States, regardless of location. The Riegle-Neal Act accomplishes this in essentially two ways. First, the Act repealed the Douglas Amendment to the Bank Holding Company Act of 1956, which prohibited a bank holding company from acquiring a bank in another State unless that State authorized the acquisition. The Riegle-Neal Act §§ 101(a), (e). After June 1, 1995, a bank holding company may acquire a bank in any State, regardless of that State's law on interstate acquisition. Second, as of June 1, 1997, and subject to several conditions, the Riegle-Neal Act provides express federal authorization for interstate branch banking, including merger transactions and opening new branches across State lines.

The Riegle-Neal Act is significant, but by 1994 technological and regulatory changes had ameliorated to a large extent customer inconvenience that might have otherwise existed because of the restrictions on the location and limitations on the size of banks. The variety of techniques that have been available to banks to expand the breadth of services and the geographic areas of operations have been numerous. One important technique has been the use of a bank holding company, which allowed a holding company to cross State lines so long as the individual banks remained legally independent of one another. Co-operation among banks in providing correspondent banking relations and establishment of loan production offices also lessened the effect of the ban on interstate banking. Banks could receive depos-

its from anywhere, and, within limits, lend anywhere. The ability of banks to use ATM machines as part of their customer service has eased the inconvenience of the lack of interstate banking. The expansion was so dramatic that by 1993, forty-six states and the District of Columbia, contrary to historic opposition and prohibition, permitted statewide branching. M. Indick and S. Kini, *The Interstate Banking and Branching Efficiency Act: New Options, New Problems*, 112 Banking L. J. 100, 103 (1995). These two authors opined that as to interstate banking, the Riegle-Neal Act codified "what had already occurred in practice." Id. at 104.

Several commentators, reviewing these market-driven responses to limitations on banking, included a discussion of one other response: the change in location of the main office and retention of branches in the State of the former main office. The first step in this procedure, relocating the main office across State lines, was so unarguably allowed under section 30(b) that the Texas Commissioner conceded the point in the trial court (Pet. App. D-18). Without exception, the use of section 30(b) to relocate the main office but retain branches was viewed with approval and in accordance with the intent of Congress and the authority of the Comptroller. The commentators believed that the 30-mile provision of section 30(b) was appropriately and legally used to establish a limited network of interstate banks. More importantly, these commentators also believed that the Riegle-Neal Act, by permitting the use of this procedure until June 1, 1997, sanctioned its use until that date. See M. Rollinger, *Interstate Banking and Branching Under the Riegle-Neal Act of 1994*, 33 Harv. J. on Legis. 183, 208-209 (1996) ("interstate branching is already the law"); M. Indick & S. Kini, *supra*, 112 Banking L. J. at 108, 116-117 (1995) (the Riegle-Neal Act "may be read to endorse the Comptroller's interpretation of Section 30").

(2) **A Clear Expression of Congressional Intent**

With this background in mind, the correctness of the Fifth Circuit's deference to the Comptroller's interpretation of section 30(b) is apparent. In the House Conference Report, Joint Explanatory Statement of the Committee of Conference, House Conf. Rep. No. 103-651, 5 U.S. Code Cong. & Admin. News, 103d Cong., 2d Sess. 2039-2089 (1994), the intent of Congress — that Congress desired broader interstate banking and passed the Riegle-Neal Act to achieve that end, but in the meantime also approved existing procedures to achieve that result — could not have been made clearer. The conferees recognized that the Comptroller

> has used the 30 mile relocation provision of the National Bank Act (section 2 of the Act of May 1, 1886, 12 U.S.C. 30), to approve several transactions which have permitted national banks to move their main offices to other States but to retain branches in the States left by the main offices.

Id. at 2078. This procedure is of course exactly what the Comptroller did in this case. The conferees next stated that the Riegle-Neal Act

> amends the provision so that after June 1, 1997, a national bank relocating its main office to another state may maintain its branches in the first state only if those branches could have been established by a bank with its home State in the new State.

Id. This statement shows that the amendment to section 30 imposed a new condition, applicable June 1, 1997, when the new interstate merger provisions became applicable. The concluding remarks make their intent absolutely clear.

> The Conferees are aware of the OCC procedures in permitting relocation across state lines. The Conferees

> concur with those procedures, including the application of appropriate State law and authority. The Conferees expect the OCC to continue to follow those procedures until the provisions of Title I [the interstate banking provisions] become fully applicable on June 1, 1997.

The essential elements of the Comptroller's position in this case — relocation of the main office across state lines and retention of branch banks — had clearly been approved by the Comptroller prior to passage of the Riegle-Neal Act. Congress was, beyond peradventure, aware of these interpretations. Scholars in the field thought all this noteworthy, but not beyond the scope of the Comptroller's authority. The Texas Commissioner disingenuously relegates this direct Congressional authority to a footnote (Petition at 23 n.20) with a characterization that it is a mere "snippet," while simultaneously attempting to bolster criticism of prior actions of the Comptroller unrelated to any issue in this case. The legislative history of the Riegle-Neal Act shows unmistakably that when Congress and the conferees intended to be critical of the Comptroller's actions in other areas, they knew how. The unqualified approval of the Comptroller's actions that form the basis of this case are thus all the more authoritative.

The petition ignores the import of the Comptroller's decisions in existence at the time of Congressional consideration of the Riegle-Neal Act. Analysis of those decisions, however, shows they are precisely in point with the Comptroller's decision on the Bank's applications. For example, in *First Fidelity*[1], the bank applied to the Comptroller for approval to relocate its main office from Philadelphia to Salem, New Jersey — a distance of about 24 miles. The bank also

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1 Decision of the Office of the Comptroller of the Currency on the Applications of First Fidelity Bank, N.A., Pa., and First Fidelity Bank, N.A., N.J. (Jan. 10, 1994), *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,644 at 83,967.

requested permission to continue to operate its existing branches in Pennsylvania.

The Comptroller under section 30(b) approved the bank's relocation of its main office to New Jersey. The Comptroller next concluded, as he did on the application of the Bank here, that the relocation of the main office did not require divestiture of the bank's existing branches. The Comptroller held that:

> Since Congress did expressly address branch retention in the context of conversions and consolidations but did not address branch retention in the relocation context, it is difficult to infer that the 1927 Congress intended the 1927 [McFadden] Act or its branch retention rules to apply in the context of main office relocations. . . . The absence of any treatment of branch retention in main office relocations in the 1927 Act or its legislative history strongly suggests that Congress intended main office relocations and the concomitant retention of existing branches to be left unchanged and left to section 30.

Id. at 83,986.[2]

For this Court, however, the most telling feature of the Riegle-Neal Act amendments to sections 30 and 36 is that new limitations on the ability of a national banking association to relocate its main office and to retain its branches after May 31, 1997, have now become applicable. See sections 30(c) and 36(e)(2), 12 U.S.C. As the Fifth Circuit recognized in its decision in *Sun World*, 117 F.3d at 314, relying directly on this Court's decision in *NationsBank of North Carolina,*

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2 In the Decision of the Office of the Comptroller of the Currency on the Applications of American Security Bank, N.A., Washington, D.C., and Maryland Bank, Baltimore, Md. (February 4, 1994), *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,695, at 84,266, the Comptroller followed essentially the same analysis as in *First Fidelity*.

N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257-59 (1995), the imposition of a Congressional limitation on a national banking association's authority is logical only if the bank already had the authority. The effect of these provisions, even if the Texas Commissioner's arguments had any validity, severely diminishes the importance of any construction of sections 30(b) or 36(c) as they applied before June 1, 1997.[3]

(3) No Conflict in the United States Courts of Appeals

The Texas Commissioner's contention that a conflict exists among the United States courts of appeals on the construction of section 30(b) is erroneous and a transparent attempt to create a reason for granting her petition. The only case seriously urged as being in conflict, *Marion Nat'l Bank v. Van Buren Bank*, 418 F.2d 121 (7th Cir. 1969), was not only decided twenty-nine years ago but is readily distinguishable as involving only the issue of creation and establishment of a new branch. Thus, the decision properly rested on an application of section 36(c). Section 30 was not even cited by the Seventh Circuit. The Texas Commissioner recognizes in her petition that the relocation of the main office must be *bona fide* and admits that the bank's action in *Marion* was not

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3 The Texas Commissioner struggles to make this issue, now supplanted by explicit provisions in the Riegle-Neal Act, into a significant problem involving many banks. The authority cited for this proposition wholly fails to support the Texas Commissioner's position and in fact contradicts it. *See Overview of Proposed Rule and Comments*, 62 Fed. Reg. 47,728-29. The implication that the Fifth Circuit's decision will result in unrestrained "seriatim relocations" (Petition at 21) ignores the geography of the State of Texas, the 30-mile limitation contained in section 30(b), the $1,500,000 financial commitment of the Bank to construct a new main office, and the ability of the Comptroller to regulate inappropriate activity.

(Petition at 24). Here, the contention of the Texas Commissioner that the Bank's relocation was not *bona fide* was so thoroughly rejected by the trial court that no appeal of that finding was attempted. On the other hand, the consistent interpretation of section 30(b) was exemplified by the decision of the Third Circuit in *Ramapo Bank v. Camp*, 425 F.2d 333 (3d Cir.), *cert. denied*, 400 U.S. 828 (1970). In Ramapo, the court concluded that branching considerations, and thus section 36, were "inapplicable to the main office relocation" and that the issue was solely governed by construction of section 30(b). 425 F.2d at 345. Also, as shown above, after May 31, 1997, the issues presented by the petition are explicitly controlled by sections 30(c) and 36(e)(2) of the Riegle-Neal Act. These sections impose new limitations on the ability of a bank that relocates its main office to retain its branches. These new sections have no application to this case.

B. The Establishment of a New Branch Bank at the Site of the Former Main Office of the Bank is Authorized by the Branch Banking Laws of the State of Arkansas

The parties agreed that section 36(c) of the National Bank Act governed the establishment of a new branch bank at the location of the Bank's prior main office in Texarkana, Arkansas, after relocation of the Bank's main office to Texas. Section 36(c) provides that a national banking association can establish and operate new branches "if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question." The Comptroller approved this new branch on two separate grounds, but Arkansas state banking law offered such an easy answer

to this issue that the Fifth Circuit relied solely on Arkansas Code Annotated § 23-32-1202(b)(2), which provides that

> [a] bank which relocates its principal banking office may continue to use its former principal banking office location as a full service branch and customer-bank communication terminal so long as the use as a banking facility is uninterrupted.

The Fifth Circuit's application of this Arkansas statute is not challenged in the petition, either as to the appropriateness of the reference to the Arkansas statute or the interpretation of that statute. Thus, there is no dispute that the Comptroller's interpretation of section 30(b) leads to the conclusion that the Comptroller properly approved the Bank's second application to open a new branch at the site of its former main office.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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No. 97-1078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CATHERINE A. GHIGLIERI,
TEXAS BANKING COMMISSIONER, PETITIONER

v.

NATIONSBANK, N.A., *ET AL.*, RESPONDENTS

On Petition for a Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

BRIEF FOR RESPONDENT NATIONSBANK, N.A., IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals in two separate opinions correctly upheld decisions of the Office of the Comptroller of the Currency interpreting a provision of the National Bank Act — which was amended and has no prospective effect after June 1, 1997 — as permitting national banks to relocate their main offices without divesting their existing branches?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 LISTINGS

The parties to the proceeding below were:

Catherine A. Ghiglieri, Texas Banking Commissioner
Eugene Ludwig, Comptroller of the Currency
Sun World, National Association
Commercial National Bank of Texarkana

At the time of the proceedings below, Sun World, National Association, was a wholly-owned subsidiary of NationsBank Texas Bank Corporation, Inc., which in turn is a direct subsidiary of NB Holdings Corporation and an indirect subsidiary of NationsBank Corporation. On January 15, 1998, Sun World was merged into respondent NationsBank, National Association, which is a direct subsidiary of NB Holdings Corporation and an indirect subsidiary of NationsBank Corporation.

The nonwholly owned subsidiaries of NationsBank, N.A., NB Holdings Corporation or NationsBank Corporation are:

206 East Redwood Street Partnership
BBI Merchant Processing Company, LLC
Boatmen's Merchant Processing Company, LLC
Carrolltowne Center Associates Limited Partnership
Cedar Mill, LLC
Community Reinvestment Group, L.C.
Education Financing Services, LLC
First Housing Development Corporation of Florida
Fountain Square Joint Venture

Gartmore Global Partners
Integrion Financial Network, LLC
MECA Software L.L.C.
Montgomery Homes Limited Partnership II
NationsBanc Mortgage Corporation
NationsBank CLO Corporation
Savannah Community Development Corporation dba
Savannah Regional Small Business Capital Fund
Third Ward Neighborhood Development Association
Unified Merchant Services
Washington View (H) Corporation
Washington View (NH) Corporation

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

STATEMENT 3

REASONS FOR DENYING THE WRIT 7

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases

Chevron U.S.A., Inc. v. *NRDC*, 467 U.S. 837 (1984) 1, 6

First National Bank in Plant City v. *Dickinson*, 396 U.S. 122 (1969) 8

First National Bank in St. Louis v. *Missouri*, 263 U.S. 640 (1924) 8

First National Bank of Logan v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966) 8

First National Bank of Southhaven v. *Camp*, 333 F. Supp. 682 (N.D. Miss. 1971), aff'd, 467 F.2d 944 (5th Cir. 1972) 9

First National Bank & Trust Co. v. *Smith*, No. K75-19 (W.D. Mich. Sept. 28, 1977) 3

Marion National Bank v. *Van Buren Bank*, 418 F.2d 121 (7th Cir. 1969) 9

McQueen v. *Ludwig*, No. 96-00036 (W.D. Mich. Sept. 4, 1997), appeal pending No. 97-2005 (6th Cir.) 7

Merchants & Miners Bank v. *Saxon*, No. 1042 (W.D. Mich. July 13, 1966) 3

NationsBank v. *Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995) 6, 9

Ramapo Bank v. *Camp*, 425 F.2d 333 (3d Cir. 1970) 3, 9

Rice v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955) 7

Smiley v. *Citibank (S.D.), N.A.*, 517 U.S. 735 9

Traverse City State Bank v. *Empire National Bank*, 228 F. Supp. 984 (W.D. Mich. 1964) 3

Statutes

National Bank Act

12 U.S.C. § 1 9

12 U.S.C. § 30 10

12 U.S.C. § 30(b) . . . . . passim

Pub. L. No. 103-328, 108 Stat. 2338, 2350, 12 U.S.C. § 30(c) 4, 6, 7

12 U.S.C. § 36 . . . . . 8, 9, 10

12 U.S.C. § 36(a) & (b) 5, 10

12 U.S.C. § 36(c) 4, 8, 10

28 U.S.C. § 1254(1) 2

Legislative History

H.R. Conf. Rep. No. 103-651 (Aug. 2, 1994) 4, 5

No. 97-1078

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CATHERINE A. GHIGLIERI,
TEXAS BANKING COMMISSIONER, Petitioner

v.

NATIONSBANK, N.A., et al., Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT NATIONSBANK, N.A., IN OPPOSITION[1/]

Petitioner ("Texas Commissioner") seeks review of two decisions of the U.S. Court of Appeals for the Fifth Circuit interpreting the National Bank Act, 12 U.S.C. § 30(b). That section was amended, effective June 1, 1997, thus guaranteeing that the issues raised here will not arise in the future. Moreover, the court of appeals faithfully applied this Court's decision in *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984), and its progeny in upholding the interpretation of the National Bank Act by the Office of the Comptroller of the

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1/ As explained at p. ii supra, NationsBank, N.A., on January 15, 1998, acquired Sun World, N.A. by merger.

Currency ("OCC"). The decisions of the court of appeals are correct and do not conflict, either in their reasoning or in their result, with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

OPINIONS BELOW

The opinion of the court of appeals in *Ghiglieri* v. *Sun World, N.A.* is reported at 117 F.3d 309 (5th Cir. 1997), and is reproduced in the Appendix to the Petition at A-1.[2/] The opinion of the district court in that case (App. C-1) is reported at 942 F. Supp. 1111 (W.D. Tex. 1996). The opinion of the OCC at issue in *Sun World* is reproduced at App. E-1.

The opinion of the court of appeals in *Ghiglieri* v. *Ludwig* (App. B-1) is reported at 125 F.3d 941 (5th Cir. 1997). The opinion of the district court in that case (App. D-1) is not reported. The opinion of the OCC at issue in *Ludwig* is reproduced at App. F-1.

JURISDICTION

The judgment of the court of appeals in *Ghiglieri* v. *Sun World, N.A.*, was entered on July 22, 1997. A petition for rehearing and a suggestion for rehearing en banc were denied on September 25, 1997. (App. G-1). The judgment of the court of appeals in *Ghiglieri* v. *Ludwig* was entered on October 29, 1997. The petition for a writ of certiorari was filed on December 23, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

[2/] The pages in the Appendix to the Petition will be cited as (App. __-__).

STATEMENT

1. Under 12 U.S.C. § 30(b), the statute in effect at the time of the actions in this case, the OCC was authorized to approve national bank main office relocations of less than 30 miles, whether within the same state or across a state line. In acting upon the application of Sun World, National Association ("Sun World") to relocate its main office less than three miles from El Paso, Texas, to Santa Teresa, New Mexico, the OCC observed that "[i]n many years of administering main office relocations under [§] 30, [it] ha[d] not required [the filing of] new branch applications for [retaining] existing branches." (App. E-48-49).

The OCC noted that, as early as 1981, it had allowed the intrastate relocation of a main office with the retention of existing branches, even when opposed by a state banking regulator. (App. E-28 n.11). It also observed that Sun World's application was "similar to a number of prior interstate relocation and branching applications approved by the OCC in more recent years." (App. E-12). Finally, the OCC discussed relevant case law where at least four courts had rejected arguments, like those made by the Texas Commissioner, that state law should limit national bank main-office relocations. (App. E-18-24).[3/] Accordingly, on August 2, 1996, the OCC approved Sun World's relocation of its main office to New Mexico, without requiring the bank to

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[3/] *Ramapo Bank* v. *Camp*, 425 F.2d 333 (3d Cir. 1970); *Traverse City State Bank* v. *Empire National Bank*, 228 F. Supp. 984, 992 (W.D. Mich. 1964); *First National Bank & Trust Co.* v. *Smith*, No. K75-19 (W.D. Mich. Sept. 28, 1977); *Merchants & Miners Bank* v. *Saxon*, No. 1042 (W.D. Mich. July 13, 1966).

divest its existing Texas branches. (App. E-1).[4/]

Had the OCC acted upon Sun World's application a year later, it would have reached a different result. In the 1994 "Riegle-Neal" amendments to the National Bank Act, Pub. L. No. 103-328, 108 Stat. 2338, 2350 (adding 12 U.S.C. § 30(c)), Congress amended § 30 to provide that national banks relocating their main offices across state lines could retain their existing branches only if those branches could be reestablished in accordance with state law. However, Congress expressly provided that this new restriction would apply only to the "relocat[ion] [of] the main office of such [national bank] from 1 state to another state *after May 31, 1997*." *Id.* (emphasis added).

The legislative history of § 30(c) recognized that the OCC

> has used the 30 mile relocation provision of [§ 30(b)] to approve several transactions which have permitted national banks to move their main offices to other States but to retain branches in the States left by the main offices.

H.R. Conf. Rep. No. 103-651, at 57 (1994). The conferees then stated that they were

> amend[ing] the provision so that *after June 1, 1997*, a national bank relocating its main office to another state may maintain its branches in the first state only if those branches could have been established by a bank with its home state in the new State.

[4/] The OCC also granted Sun World's concurrent application under 12 U.S.C. § 36(c) to open a new branch at the site of its former El Paso main office. (App. E-73-74, E-84).

Id. (emphasis added). In their concluding remarks, the conferees stated that they were:

> aware of the OCC procedures in permitting relocation across state lines. The Conferees concur[red] with those procedures, including the application of appropriate State law and authority. *The Conferees expect the OCC to continue to follow those procedures until the provisions of Title I become fully applicable on June 1, 1997.*

Id. (emphasis added).

2. The Texas Commissioner disagreed with the OCC's interpretation of § 30(b) of the National Bank Act as allowing banks to relocate their main offices across state lines prior to June 1, 1997, without losing their branches. She argued that under the Act, 12 U.S.C. §§ 36(a) & (b), banks could retain existing branches only in the limited circumstances specified in those provisions. Accordingly, she filed suit in the District Court for the Western District of Texas seeking to invalidate the OCC's decision. (The Texas Commissioner had successfully pursued a similar action against another bank in the Northern District of Texas. (App. D-1)). The district court in the *Sun World* case followed the decision of the Northern District of Texas and on October 29, 1996, granted summary judgment for the Texas Commissioner. (App. C-1).

3. Sun World and the OCC appealed to the Fifth Circuit. On July 22, 1997, that court (Judges Jolly, Duhé & Emilio M. Garza) vacated the district court's decision and remanded the case for entry of judgment upholding the OCC's construction of § 30(b) of the National Bank Act as allowing Sun World to retain its existing Texas branches after relocating its main office to New Mexico. (App. A-1). Finding it "plain" that the 'statute is silent" on the issue of

branch retention for main office relocations prior to June 1, 1997 (App. A-6), the lower court concluded that under *Chevron* v. *NRDC*, 467 U.S. 837 (1984), and *NationsBank* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995), the OCC's interpretation of the National Bank Act should be given "controlling weight," if it represents a "reasonable" interpretation of the statute (App. A-5).

The lower court concluded that the OCC's interpretation of the Act was reasonable for three separate reasons. First, "the Commissioner's position would result in a deprivation of lawfully acquired property interests [*i.e.*, existing branches] without express statutory authority." (App. A-7). Second, the restrictions on branch retentions imposed by § 30(c) after May 31, 1997, "indirectly support[] the [OCC's] position," since "the imposition of a Congressional limitation on a national bank's authority is logical only if the banks already had the authority," citing *NationsBank*, 513 U.S. at 257-59. (App. A-7). Third, the legislative history of the 1994 amendments to the National Bank Act adding that limitation (see pp. 4-5, *supra*) "suggests that Congress indeed viewed the practice of allowing retention of branches upon relocation under § 30(b) favorably and did not intend to end the practice until the effective date" of those amendments. (App. A-8).[5/]

On October 29, 1997, another panel of the Fifth Circuit (Judges Jolly, Benavides, Reavely concurring) followed the *Sun World* case and reversed the decision of the Northern District of Texas. (App. D-1).

[5/] The court of appeals also rejected the Texas Commissioner's argument that the OCC improperly allowed Sun World to open a new branch at the site of its former main office in El Paso. (App. A-9-10). The Texas Commissioner does not challenge this part of the lower court's decision.

REASONS FOR DENYING THE WRIT

1. The petition in this case challenges the OCC's construction of § 30(b) of the National Bank Act, prior to June 1, 1997 -- the effective date specified in § 30(c) for a new branch retention rule applicable to interstate main office relocations. To date, the only two appellate opinions construing § 30(b) in an interstate relocation context arising prior to June 1, 1997, are the ones challenged in the instant petition.[6/] Because this case concerns the interpretation of a statute that has been amended and will not apply to future transactions, it is a particularly inappropriate vehicle for the exercise of this Court's certiorari jurisdiction. *See Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955) (writ dismissed as improvidently granted after new statute ensured that issue would not arise again); Robert L. Stern, et al., *Supreme Court Practice* § 4.4, at 172 (7th ed. 1993).[7/]

[6/] A district court in another circuit has similarly upheld the OCC's construction of § 30(b) in connection with an interstate main office relocation occurring prior to June 1, 1997. *McQueen* v. *Ludwig*, No. 96-00036 (W.D. Mich. Sept. 4, 1997) (unreported), *appeal pending*, No. 97-2005 (6th Cir.).

[7/] The Texas Commissioner's argument that "the problem" raised by this case is not "isolated" (Pet. 15) is unconvincing. Her contention that "numerous branches were established nationwide using the [OCC's] flawed interpretation of [§] 30" (*id.*) is both exaggerated and irrelevant. This Court's acceptance of the Texas Commissioner's view of § 30(b) would almost certainly have no effect upon these other transactions, since they were either unchallenged or decisions rejecting such challenges are now final. The same observation applies to the Texas Commissioner's assertion that the OCC's "interpretation effectively exempts a significant number of national branching networks from [state law] restrictions . . . . [and] thus disrupts the level playing field envisioned by Congress for the dual banking system." (Pet. 15).

2. The decisions below are not in conflict with any prior decisions of this Court or of other circuits. As noted above, no appellate court had decided the issue of branch retention in an interstate main office relocation context until the two decisions of the Fifth Circuit that are challenged in the petition.

There is similarly no conflict with respect to the "doctrine of competitive equality" that the Texas Commissioner argues is embodied in § 36 of the National Bank Act. (Pet. 19). All of the decisions of this Court that the Texas Commissioner cites in support of her "competitive equality" argument concern the establishment of a *new* national bank branch, either directly or by conversion of a state-bank branch to a national-bank branch, *e.g.*, *First Nat'l Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924); *First Nat'l Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966), or they pertain to conduct by national banks that was challenged as being equivalent to the operation of a new branch, *e.g.*, *First Nat'l Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969). Section 36(c) indisputably applies to the establishment of *new* branches, imposing upon national banks limitations derived from applicable state law.[8/] However, the Texas Commissioner cites no decision of this Court where § 36 of the Act — and the purported doctrine of "competitive equality" — have been applied to require a national bank to divest its *existing* branches in a main office relocation or in any other context.

[8/] Accordingly, in ruling upon Sun World's application to establish a new branch at the location of its former main office in El Paso, the Fifth Circuit applied § 36(c) and concluded that the new branch could be established consistent with Texas law. (App. A-9-10). As noted (p. 6, n.5), the Texas Commissioner does not challenge this aspect of the court of appeals' decision.

The court of appeals decisions upon which the Texas Commissioner bases her "conflict" argument similarly fail to support the petition. She concedes (Pet. 24-25) that *Marion Nat'l Bank* v. *Van Buren Bank*, 418 F.2d 121 (7th Cir. 1969), and *Ramapo Bank* v. *Camp*, 425 F.2d 333 (3d Cir. 1970), concerned only the bona fides of a main office relocation. As the Texas Commissioner expressly stated below, "none of these cases involved retaining *existing* branches." (Appee. Br. in *Sun World* at 22, emphasis in original).[9/]

3. The Texas Commissioner mounts a broad-scale attack upon "administrative agencies" as a "headless 'fourth branch' of the Government" (Pet. 13),[10/] and suggests that affording *Chevron* deference to an agency's construction of the statute which it implements, at least in this case, violates "the constitutional framework of separation of powers and considerations of federalism." (Pet. i). This Court has repeatedly applied the *Chevron* doctrine *in reversing* lower courts (including the Fifth Circuit) for failing to give deference to the OCC's construction of the National Bank Act. *See NationsBank*, 513 U.S. 251 (reversing the Fifth Circuit); *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 116 S. Ct. 1730 (1996) (reversing the California Supreme Court).[11/]

[9/] The same observation applies to the Texas Commissioner's reliance on *First Nat'l Bank of Southhaven* v. *Camp*, 333 F. Supp. 682 (N.D. Miss. 1971), *aff'd*, 467 F.2d 944 (5th Cir. 1972). Moreover, this 27-year old decision of a district court in the Fifth Circuit cannot possibly provide the basis for a "conflict" with two later Fifth Circuit decisions.

[10/] The OCC is in the Treasury Department, 12 U.S.C. § 1, and thus is part of the Executive Branch. Unlike the FCC, NLRB, and FTC, it is not an "independent" or "fourth branch" agency.

[11/] The Texas Commissioner's observation that the OCC may not promulgate rules under § 36 of the National Bank Act does not support her

(continued...)

Thus, this case presents a particularly unsuitable vehicle for the type of reconsideration of the *Chevron* doctrine implicit in the Texas Commissioner's arguments.

Certainly, the Texas Commissioner's arguments that there was no ambiguity in the National Bank Act and that the court of appeals "neglected to consider the legislative histories of [§§ 30 & 36] and Riegle-Neal" (Pet. 28) do not justify reexamination of the Fifth Circuit's application of *Chevron*. The court of appeals noted the silence of § 30(b) regarding branch retention (App. A-6), and it was unpersuaded that §§ 36(a) & (b), which permit branch retention in certain limited circumstances, implicitly required the OCC to force banks to divest their existing branches in all of the many other circumstances that fall outside the terms of those provisions (App. A-6, A-15).[12/]

Moreover, the court of appeals carefully examined the most pertinent legislative history — the 1994 Riegle-Neal amendments when Congress for the first time directly addressed the issue of branch retention in a main office

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[11/](...continued)
attack upon the *Chevron* doctrine as applied to the OCC in this case. (Pet. 31). The issue here is whether under § 30(b) a bank was entitled to relocate its main office without losing its branches. The Fifth Circuit did not cite *Chevron* in dealing with the different question under § 36(c) whether the agency correctly allowed Sun World to establish a new branch at the site of its former main office. (App. A-9-10).

[12/] The lower court correctly observed that construing § 30(b) and §§ 36(a) & (b) as requiring branch divestiture when a bank relocates its main office could not be restricted to interstate relocations under § 30(b). *See* App. A-15, rejecting the Texas Commissioner's argument as "nonsensical because, if carried to its conclusion, no relocating national bank had the authority to retain its pre-existing branches even if it simply moved its main office across the street."

relocation context and concluded that "Congress indeed viewed the practice of allowing retention of branches upon relocation under § 30(b) favorably and did not intend to end the practice until [June 1, 1997] the effective date of the Riegle-Neal amendments." (App. A-8).

Finally, the court of appeals' decision set forth at length its rationale for concluding that the OCC's interpretation of the National Bank Act was "reasonable." *See* p. 6, *supra*. The Texas Commissioner has not come close to justifying her request that this Court use its certiorari jurisdiction to review that decision.

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1997

CATHERINE A. GHIGLIERI,
TEXAS BANKING COMMISSIONER, PETITIONER

v.

SUN WORLD NATIONAL ASOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether the Comptroller of the Currency reasonably interpreted 12 U.S.C. 30(b), as previously applicable, to permit a national bank that relocated its main office across state lines to retain existing branches in the State of origin.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	8
Department of Banking v. *Clarke*, 809 F.2d 266 (5th Cir.), cert. denied, 483 U.S. 1010 (1987)	8
First Nat'l Bank in Plant City v. *Dickinson*, 396 U.S. 122 (1969)	9
First Nat'l Bank in St. Louis v. *Missouri*, 263 U.S. 640 (1924)	9
First Nat'l Bank of Logan v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966)	9
Independent Bankers Ass'n of America v. *Clarke*, 917 F.2d 1126 (8th Cir. 1990)	8
Marion Nat'l Bank v. *Van Buren Bank*, 418 F.2d 121 (7th Cir. 1969)	8
McQueen v. *Ludwig*, No. 97-2005 (6th Cir., Feb. 13, 1998)	10
NationsBank of North Carolina, N.A. v. *Variable Annunity Life Ins. Co.*, 513 U.S. 251 (1995)	7-8
Seattle Trust & Sav. Bank v. *Bank of California, N.A.*, 492 F.2d 48 (9th Cir.), cert. denied, 419 U.S. 844 (1974)	9
Smiley v. *Citibank (South Dakota), N.A.*, 116 S. Ct. 1730 (1996)	7, 8

Statutes: Page

Act of Sept. 8, 1959, Pub. L. No. 86-230, § 3, 73 Stat. 457 5-6
Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338:
§ 102(b)(1), 108 Stat. 2349 10
§ 102(b)(2), 108 Stat. 2350 9
12 U.S.C. 1 *et seq.* 2, 5
12 U.S.C. 30 3
12 U.S.C. 30(b) 2, 4, 5, 6, 7, 8, 9
12 U.S.C. 30(c) 9, 10
12 U.S.C. 36 ..... 3, 6, 7, 8, 9
12 U.S.C. 36(a) 6
12 U.S.C. 36(b) 6
12 U.S.C. 36(c) 2, 3, 4, 5, 6, 8, 9
12 U.S.C. 36(d) 6
12 U.S.C. 36(e) 6, 7, 10
12 U.S.C. 36(e)(2) 10
12 U.S.C. 36(f)-(*l*) 6
12 U.S.C. 93a 8

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1078

CATHERINE A. GHIGLIERI,
TEXAS BANKING COMMISSIONER, PETITIONER

v.

SUN WORLD NATIONAL ASOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in *Ghiglieri* v. *Sun World National Association* (Pet. App. A1-A16) is reported at 117 F.3d 309, and that court's opinion in *Ghiglieri* v. *Ludwig* (Pet. App. B1-B6) is reported at 125 F.3d 941. The opinion of the district court in *Sun World* (Pet. App. C1-C13) is reported at 942 F. Supp. 1111. The opinion of the district court in *Ludwig* (Pet. App. D1-D41) is unreported.

JURISDICTION

The judgment of the court of appeals in *Ghiglieri* v. *Sun World National Association* was entered on July 22, 1997, and a petition for rehearing was denied on September 25, 1997. The judgment of the court of

appeals in *Ghiglieri* v. *Ludwig* was entered on October 29, 1997. The petition for a writ of certiorari was filed on December 23, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Sun World National Association (Sun World) is a national bank subject to the provisions of federal banking law, 12 U.S.C. 1 *et seq.*, and to regulation by the Comptroller of the Currency. Previously, Sun World maintained its main banking office and two additional branches in El Paso, Texas. Pet. App. A2. In 1996, Sun World applied to the Comptroller, in accordance with 12 U.S.C. 30(b), for approval to relocate its main banking office from El Paso to Santa Teresa, New Mexico, a distance of less than five miles. Section 30(b) permits such relocations, subject to the approval of the Comptroller and of two-thirds of the bank's stockholders, provided that the new location is no more than 30 miles beyond the limits of the city, town or village in which the bank was previously located. The Comptroller approved Sun World's application. Pet. App. A2.

Sun World also sought the Comptroller's approval, under 12 U.S.C. 36(c), to establish a new branch at the site of its former main office in El Paso. Pet. App. A2. Section 36(c) generally permits a national bank, with the Comptroller's approval, to establish and operate new branches in the locality or State in which the bank is "situated," if state law authorizes similar branching by state-chartered banks. Because he determined that Sun World's existing El Paso branches caused the bank to be "situated" there, as well as in Santa Teresa, after the relocation of its head office, and because Texas law allows state-wide

branching by state banks, the Comptroller also approved Sun World's second application. See *Id.* at A9-A10.

Petitioner, the Texas Banking Commissioner, opposed Sun World's applications before the Comptroller, and she subsequently filed suit to set aside his decisions and to enjoin Sun World from operating branches in both Texas and New Mexico. Pet. App. A2-A3. The district court granted summary judgment for petitioner, holding that Sun World could not retain its Texas branches after it relocated its main office to New Mexico. *Id.* at A3, C1-C13.

The court of appeals reversed. Pet. App. A1-A2. The court noted that Congress had specifically addressed the issues raised by petitioner's objections, but that it had expressly limited the application of those provisions to bank relocations occurring after May 31, 1997. *Id.* at A3. Applying the law as it existed before Congress had "clearly spoken to the precise issue[s] before [the court]" (*id.* at A6), the court held that Sections 30 and 36 were silent as to a bank's ability to retain branches in one State after relocating its main office to another (*ibid.*). Finding the Comptroller's conclusion that the relevant provisions permitted such retention to be reasonable, the court deferred to that interpretation and reinstated the Comptroller's decision permitting continued operation of Sun World's two existing branches in El Paso. *Id.* at A4-A5, A7-A8. Further agreeing with the Comptroller that those branches caused Sun World to be "situated" in Texas, as well as in New Mexico, for purposes of Section 36(c), the court also reinstated the Comptroller's decision that Sun World was entitled to take advantage of the branching rules

applicable, under Texas law, to similarly situated state institutions. *Id.* at A9-A10.

2. Respondent Commercial National Bank of Texarkana (CNB) is a national bank that formerly maintained its main office and two branch offices in Texarkana, Arkansas. In 1994, CNB sought the Comptroller's approval under Section 30(b) to relocate its main office to Texarkana, Texas. Like Sun World, CNB also sought approval under Section 36(c) to open a new branch at the site of its former main office in Arkansas. The Comptroller approved both applications, over petitioner's objections. Pet. App. B2, F1-F27.

Petitioner filed suit to challenge the Comptroller's actions, and the district court granted summary judgment setting aside the Comptroller's decisions and enjoining CNB from operating in Texas. Pet. App. B2-B3, D1-D41. The court of appeals reversed. *Id.* at B1-B6. As to the bank's retention of existing branches in Arkansas after its relocation to Texas under Section 30(b), the court relied on its previous decision in *Sun World*. *Id.* at B3. With respect to establishment of a new branch, the court again agreed with the Comptroller that, after its relocation under Section 30(b), CNB was "situated" in both Arkansas and Texas for purposes of Section 36(c)'s new-branch rules. The court also agreed that Arkansas law authorized the transformation of the bank's former principal office into a branch. *Id.* at B3-B5. The court therefore reinstated both of the Comptroller's approvals.

ARGUMENT

Petitioner argues that the court of appeals erred in acccepting the Comptroller of the Currency's conclusion that the respondent banks could retain existing branches in one State after properly relocating their principal offices to another State under 12 U.S.C. 30(b).[1] To the contrary, the court properly deferred to the Comptroller's permissible interpretation of federal banking laws that Congress has committed to his administration, and its decisions do not conflict with any decision of this Court or of another court of appeals. In any event, Congress has specifically addressed the point at issue through statutory amendments that took effect on June 1, 1997, and the matter has therefore been definitively settled for the future. The decisions below therefore merit no further review.

1. Federal banking laws administered by the Comptroller of the Currency, 12 U.S.C. 1 *et seq.*, govern all aspects of the creation, operation, and administrative supervision of national banks. Under 12 U.S.C. 30(b), a national bank may, subject to approval by two-thirds of its shareholders and by the Comptroller, relocate its main office "to any * * * location within or outside the limits of the city, town, or village in which it is located, but not more than thirty miles beyond such limits." Section 30(b) formerly limited such moves to new locations "within the same State," but Congress removed that limitation in 1959. Act of Sept. 8, 1959, Pub. L. No. 86-230,

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[1] Petitioner does not renew in this Court her additional argument below that the Comptroller improperly interpreted 12 U.S.C. 36(c) to allow the establishment of new branches at the sites of respondents' former principal offices. See Pet. i.

§ 3, 73 Stat. 457. Nothing in Section 30(b) suggests that a bank that relocates its main office, whether within one State or across a state line, thereby forfeits its authorization to maintain branches through which it was legally operating at the time of the relocation.

Petitioner contends that Congress expressly imposed such a limitation, applicable to this case, in 12 U.S.C. 36. See, *e.g.*, Pet. 16-21. That is not correct. Sections 36(a), (b) and (d) set out the conditions under which a national bank may "retain" certain branches that it operated before 1927 or before acquiring a federal charter, or that it acquired through a merger or other consolidation. Section 36(c) specifies when the bank may "establish and operate" new branches. Sections 36(f) through (*l*) deal with interstate branching, minimum capital requirements, approval by the Comptroller, and the definition of terms. Not until the addition of subsection (e) in 1994, however, did anything in Section 36 address the issue of a bank's continued operation of existing branches after a relocation properly authorized under Section 30(b). And Section 36(e), which does address that question, expressly provides that its requirements are not effective until June 1, 1997—well after the administrative approvals at issue in this case, which therefore continue to be governed by prior law.

The Comptroller's conclusion that relocation of the respondent banks' main offices, properly approved under Section 30(b), had no effect on their authority to continue operating pre-existing branches is therefore consistent both with Section 30(b) and with Section 36. Section 30(b) authorizes headquarters relocations without suggesting any need to cease operating existing branches. The applicable provisions

of Section 36, on the other hand, deal specifically with a number of branching issues, including situations in which a specified occurrence may *preclude* a bank from retaining an existing branch, but they do not address the retention of existing branches after a main-office relocation.[2] Even if it would be possible to sustain other interpretations of those provisions, separately or together, the court of appeals properly recognized (Pet. App. A4-A7) that it was required to defer to any "permissible" interpretation adopted by the Comptroller. The Comptroller's decisions in these cases satisfy that standard, and the court of appeals properly reinstated them. See *Smiley* v. *Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1733 (1996); *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257

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[2] Petitioner contends (see Pet. 17-18) that the introductory language of Section 36 ("The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:") shows that the succeeding subsections define the only conditions under which a bank may "retain" existing branches. As the court of appeals recognized (Pet. App. A15 (note 5)), however, that argument would prove too much: Under petitioner's construction, a bank that relocated its office within the same State, either before or after the effective date of Section 36(e), would have no authority to "retain" its existing branches. Moreover, petitioner suggests no basis for determining whether any other corporate action—a change of name, for example, or other charter amendment—would trigger a branch "retention" analysis under Section 36, or for distinguishing any such action from a main-office relocation authorized by Section 30(b). Petitioner's reading of Section 36 is therefore implausible.

(1995); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).[3]

2. Petitioner contends (Pet. 16-21, 24-28) that the decisions below conflict with decisions of this Court and other courts of appeals. That argument confuses the question presented by the petition, which involves retention of *existing* branches after an interstate headquarters move, and quite different issues that arise under Section 36(c) when a national bank seeks to establish a *new* branch—including a new branch in the former headquarters location. For example, *Marion Nat'l Bank* v. *Van Buren Bank*, 418 F.2d 121 (7th Cir. 1969), on which petitioner relies (Pet. 24-26), involved a bank's request to establish a new branch in place of its former main office after that office was moved to a different location within the same State.

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[3] There is little force to petitioner's argument (Pet. 31-32), raised for the first time in this Court, that no deference is due the Comptroller's interpretation of Section 36 because Congress has withheld from him the authority to promulgate regulations implementing that Section. See 12 U.S.C. 93a. Even if the decisions at issue here were based primarily on interpretation of Section 36, rather than Section 30(b), the withholding of authority to issue regulations hardly implies an instruction to the courts not to defer to a responsible administrator's reasonable interpretation of the underlying statute, including the interaction of provisions that are part of the overall statutory scheme that has been committed to the administrator's supervision. See, *e.g.*, *Smiley*, 116 S. Ct. at 1733 ("The Comptroller * * * is charged with the *enforcement* of banking laws to an extent that warrants the invocation of [the rule of deference] with respect to his *deliberative conclusions* as to the meaning of these laws.") (emphasis added); see also *Department of Banking* v. *Clarke*, 809 F.2d 266, 269 (5th Cir.) (deferring to Comptroller's construction of Section 36), cert. denied, 483 U.S. 1010 (1987); *Independent Bankers Ass'n of America* v. *Clarke*, 917 F.2d 1126, 1129 (8th Cir. 1990) (same).

See also *Seattle Trust & Sav. Bank* v. *Bank of California, N.A.*, 492 F.2d 48 (9th Cir.), cert. denied, 419 U.S. 844 (1974) (establishment of new branches in non-headquarters State where bank already has existing branches). Similarly, the cases from this Court that petitioner cites involved the authority to establish *new* branches. See *First Nat'l Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924) (establishment of branches before enactment of Section 36); *First Nat'l Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966) (establishment of new branches under section 36); *First Nat'l Bank in Plant City* v. *Dickinson* 396 U.S. 122 (1969) (armored car and deposit receptacle were new "branches" that could be established only in accordance with Section 36).

There was no dispute in this case that the requirements of Section 36(c), which incorporate the law of the State in which the proposed new branch is "situated," apply to the establishment of new branches. Indeed, the court of appeals applied both Section 36(c) and the laws of Texas and Arkansas in reviewing and upholding the Comptroller's approval of respondents' applications to establish new branches in the locations of their former main offices. Pet. App. A9-A10, B3-B5. Thus, petitioner can establish no conflict between the decisions she cites and the decisions below.

3. As noted above, Congress has prospectively settled the statutory question that petitioner seeks to present. In the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, § 102(b)(2), 108 Stat. 2350, Congress specifically addressed the issue of interstate headquarters relocations under Section 30(b) by adding a new subsection (c) to Section 30:

> In the case of a national bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State from which the bank relocated such office only to the extent authorized in section 36(e)(2) of this title.

12 U.S.C. 30(c). The same amendments also added new Section 36(e)(2), which imposes specific conditions on the retention of branches in a former home State after an interstate main-office relocation. Pub. L. No. 103-328, § 102(b)(1), 108 Stat. 2349. As in new Section 30(c), Congress expressly provided that the restrictions imposed by Section 36(e)(2) would apply to home-office moves occurring "after May 31, 1997." 12 U.S.C. 36(e)(2).[4]

In view of the enactment of Sections 30(c) and 36(e), both of which have now become effective in accordance with their terms, the statutory question presented in this case will not arise again in the future.[5]

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[4] As the court of appeals pointed out (Pet. App. A7-A8), in enacting the 1994 amendments—and their delayed effective date—Congress specifically adverted to the Comptroller's contrary interpretation of pre-amendment law. See *id.* at L19-L20 (reprinting relevant portion of congressional conference report). If, as petitioner contends (Pet. 23), Congress disagreed with that interpretation, or if it wished to supplant prior law immediately with new provisions, it is difficult to understand why it would have embedded significantly deferred effective dates directly into the very specific provisions at issue. Those provisions, and their delayed effective date, appear instead to represent a conscious legislative compromise, which it would be inappropriate to disturb.

[5] The Comptroller is aware of only one other pending case involving a relocation governed by prior law. *McQueen* v. *Ludwig*, No. 97-2005 (6th Cir.) (briefing completed Feb. 13, 1998).

Accordingly, that question does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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v.

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY;
SUN WORLD NATIONAL ASSOCIATION, EL PASO, TEXAS;
AND COMMERCIAL NATIONAL BANK OF TEXARKANA,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit
Case Nos. 96-50847, 96-50948 and 96-10818

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18 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. An Interpretation of a Federal Agency that Contradicts the Plain Language of the Statute is Not Entitled to Deference. 2

A. Since the filing of the Petition for a Writ of Certiorari, this court has issued its opinion in *National Credit Union Administration v. First National Bank and Trust Co., et al.*, ___ U.S. ___, 118 S.Ct. 927 (1998) ("*NCUA*"). In that case, this Court held that the federal agency interpretation was contrary to the unambiguously expressed intent of Congress and, therefore, impermissible under the first step of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). 2

II. The Legislative History is Not Contrary to the Textual Analysis of the National Bank Act. 4

III. Ambiguous Legislative History Cannot Change the Plain Language of the Statute. 5

IV. The Decisions Conflict withh Opinions of this Court and other Circuits. 8

A. The Court of Appeals' decision allowing implied branching authority conflicts with a long-standing decision of this Court. 9

B. The Court of Appeals has decided a question of deference in a way that conflicts with the decisions of this Court. 9

C. The Court of Appeals decision conflicts with similar cases from other Circuits. 10

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Barnett Bank of Marion County v. Nelson,
517 U.S. 25, 116 S.Ct. 1103, 1107 (1996) . . . **10**

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) **2-5, 7, 10**

Clark v. Securities Indus. Ass'n.,
479 U.S. 388, 107 S.Ct. 750 (1987) **4**

First Nat'l Bank in St. Louis v. Missouri,
263 U.S. 640, 44 S.Ct. 213 (1924) **9, 11**

First Nat'l Bank of Logan v. Walker Bank and Trust Co.,
385 U.S. 252, 87 S.Ct. 492 (1966) **4, 11**

Ghiglieri v. Ludwig,
125 F.3d at 944 (Pet. App. B-6) **3**

National Credit Union Administration v. First National Bank and Trust Co., et al., ___ U.S. ___,
118 S.Ct. 927 (1998) **2**

STATUTES

12 U.S.C. §36. 2

12 U.S.C. §93a 10

N.M. STAT. ANN. §§58-1C-4, 58-1C-5, 58-1C-6, 58-1C-7, 58-1C-8 (1996) 10

TEX. FIN. CODE ANN. §32.0095 (Vernon Supp. 1998) . . . 10

LEGISLATIVE HISTORIES

H.R. CONF. REP. NO. 651, 103d Cong., 2d Sess. 53, 51 (Aug. 2, 1994) (Pet. App. L-19) 5

OTHER

Decision of the Office of the Comptroller of the Currency on the Applications of First Fidelity Bank, N.A., Penn., and First Fidelity Bank, N.A., N.J. (Jan. 10, 1994), *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,644, at 83,983 6

Decision of the Office of the Comptroller of the Currency on the Applications of Bank Midwest of Kansas, N.A., and Bank Midwest,N.A., Missouri (Feb. 16, 1995), *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep.(CCH)¶ 90,474 6

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SUN WORLD NATIONAL ASSOCIATION, EL PASO, TEXAS;
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On Petition for a Writ of Certiorari
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Case Nos. 96-50847, 96-50948 and 96-10818

REPLY BRIEF FOR THE PETITIONER

This case presents issues of extraordinary importance to the state and national banks in Texas that must compete with two banks that, through the administrative invention of implied authority, may retain interstate branches. The Court of Appeals' ruling adversely affects nearly 900 banks in Texas and thousands of banks throughout the country that compete with interstate branches established outside the Congressional design implemented in the Riegle-Neal Interstate Bank and Branching Efficiency

Act of 1994 ("Riegle-Neal") and, without explanation, overturns long-standing decisions of this Court.

I. An Interpretation of a Federal Agency that Contradicts the Plain Language of the Statute is Not Entitled to Deference.

A. Since the filing of the Petition for a Writ of Certiorari, this court has issued its opinion in *National Credit Union Administration v. First National Bank and Trust Co., et al.*, ___ U.S. ___, 118 S.Ct. 927 (1998) ("*NCUA*"). In that case, this Court held that the federal agency interpretation was contrary to the unambiguously expressed intent of Congress and, therefore, impermissible under the first step of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*").

The Fifth Circuit, like the district court in *NCUA*, adopted an agency interpretation that reads some words out of the statute entirety. See *NCUA* at 930. Rather than considering the complete statutory scheme of the National Bank Act, the Fifth Circuit ignored the branching restrictions of Section 36. *12 U.S.C. §36.*

Judge Reaveley, in his concurrence in the Court below, specifically stated that the National Bank Act "is not silent with respect to the retention of branches after a relocation of the main office. Section 36 begins: 'The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:'". *Ghiglieri v. Ludwig,* 125 F.3d at 944 (Pet. App. B-6).

This Court has made clear that when there is no ambiguity in the statute, deference is inappropriate. See, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 843 n.9,104 S. Ct. At 2781-82 n.9. Under the agency interpretation, Section 36 is mere surplusage because a national bank had the authority to retain existing branches whenever it changed the location of its main office. The agency interpretation not only renders Section 36 unnecessary but makes the adoption of the landmark Riegle-Neal Act a futile congressional gesture. Such an interpretation cannot be squared with the plain language or legislature history of the National Bank Act, the McFadden Act or the Riegle-Neal Act.

II. The Legislative History is Not Contrary to the Textual Analysis of the National Bank Act.

Branching is not an area about which Congress has been silent. There is no dispute that the purpose of the McFadden Act is to provide competitive equality between state and national banks in the matter of branch banking. *First Nat'l Bank of Logan v. Walker Bank and Trust Co.*, 385 U.S. 252, 87 S.Ct. 492 (1966); *Clark v. Securities Indus. Ass'n.*, 479 U.S. 388, 107 S.Ct. 750 (1987).

The legislative history of the Riegle-Neal Act does not compel a different result. Not one comment indicates that competitive equality in the area of branching is relegated to an historical footnote. Instead, the language and structure of the Riegle-Neal Act is consistent with the doctrine of competitive equality. Despite this clear purpose to put state and national banks on equal footing in the area of branching, the Court below makes no mention of this overriding Congressional purpose in its step one *Chevron* analysis. Consequently, the Court errs in deferring to an agency interpretation that neither complies with the plain language

nor promotes the Congressional purposes behind the National Bank Act.

III. Ambiguous Legislative History Cannot Change the Plain Language of the Statute.

There is no gap in the statute on the question of retention of branches. Because the plain language of Section 36 indicates the conditions under which a national bank can retain branches, the court below misapplied *Chevron* by failing to discern congressional intent from the statute's text and purpose.

The Conference Report, on the other hand, is ambiguous on this issue. Although the Report indicates Congressional approval of the Comptroller's actions in two interstate relocations, it qualifies the comment by requiring the adherence to state law. H.R. CONF. REP. NO. 651, 103d Cong., 2d Sess. 53, 51 (Aug. 2, 1994) (Pet. App. L-19) ("Conference Report"). This ambiguity in the Conference Report can be understood by reviewing the two decisions. Until 1994, the Office of the Comptroller of Currency

("Comptroller") and its predecessors consistently interpreted the National Bank Act to prohibit the retention of interstate branches when a bank moved its headquarters across state lines. In that year, the Comptroller reversed this long standing policy when two banks with pre-1927 branches moved across state lines. The Comptroller, in those decisions, applied alternative rationales to permit the retention of out of state branches. First, the Comptroller articulated an implied adjunct authority to Section 30 to authorize the retention of existing branches. *Decision of the Office of the Comptroller of the Currency on the Applications of First Fidelity Bank, N.A., Penn., and First Fidelity Bank, N.A., N.J.* (Jan. 10, 1994), *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,644, at 83,983 ("*First Fidelity*"). Alternatively, the Comptroller asserted the retention of branches was authorized under 36(a) for the pre-1927 branches. *Id.* Not until after the passage of the Reigle-Neal Act did the Comptroller issue an opinion relying only an implied authority to retain branches. *See Decision of the Office of the Comptroller of the Currency on the Applications of Bank*

Midwest of Kansas, N.A., and Bank Midwest,N.A., Missouri (Feb. 16, 1995), *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep.(CCH)¶ 90,474.

Using this ambiguous paragraph to alter the meaning of statutory language and well known Congressional purposes highlights the dangers of relying on isolated portions of legislative history to discern Congressional intent. While legislative history may inform the judicial inquiry in the step one analysis of *Chevron*, it should not be used to change the language that best indicates Congressional intent.

Relying on this isolated paragraph, Respondents repeatedly assert that the amendments to §30 and §36 adopted in the Riegle Neal Act are new limitations on existing authority. Again, a review of the statutory language shows that this is not the case. Except for pre-1927 branches, §36 nowhere provided for the establishment or retention of interstate branches. Absent the amendments, national banks would lack the authority to establish,

maintain, or operate interstate branches, even where state law allowed.[1] Rather than a restriction, the amendments were both necessary and consistent with the new authority to operate interstate branches. Their effective date coincided with the June 1, 1997 advent of nationwide branching.

IV. The Decisions Conflict with Opinions of this Court and other Circuits.

Respondents oppose plenary review by this court. They assert that there is no conflict with this court or among the circuits and that a decision will not apply to future transactions. Those assertions are without merit.

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[1]Section 36(c) only authorizes establishing branches in the state.

A. The Court of Appeals' decision allowing implied branching authority conflicts with a long-standing decision of this Court.

The question presented posed by the Federal Respondent highlights the conflict between the Court of Appeals' decision and a long-standing decision of this Court. *See, First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 44 S.Ct. 213 (1924) ("*St. Louis*"). *St. Louis* makes clear that a national bank has no implied or incidental power to branch. See, Pet. 16-21. The Fifth Circuit decision overturns this Court's decision in *St. Louis*. In addition, the decision of the Court of Appeals creates branching power where there has been none and overturns the doctrine of competitive equality without comment. See Pet. 24-28.

B. The Court of Appeals has decided a question of deference in a way that conflicts with the decisions of this Court.

The rationale for the application deference is that Congress has implicitly or explicitly delegated the authority

"to fill in the gaps" to the executive agency. *Chevron*, 467 U.S. at 844, 104 S.Ct. at 2782. Even if there were a gap to fill, Congress has explicitly withheld authority from the Comptroller to determine branching policy. See 12 U.S.C. §93a. There is no grounds to presume legislative delegation to the Comptroller in the area of branching. See also, *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 116 S.Ct. 1103, 1107 (1996).

C. The Court of Appeals decision conflicts with similar cases from other Circuits.

Respondents attempt to distinguish this case from other Circuit Court decisions involving applications for simultaneous relocations and branch-backs to the former main office. But in each of these other decisions, the Courts noted that the branch-back complied with state law. (Pet. 24-28) In the two decisions contested here, no state bank could branch from New Mexico into Texas or from Texas to Arkansas. TEX. FIN. CODE ANN. §32.0095 (Vernon Supp. 1998); N.M. STAT. ANN. §§58-1C-4, 58-1C-5, 58-1C-6, 58-

1C-7, 58-1C-8 (1996). Because the Fifth Circuit has frustrated the clear Congressional policy to foster a climate of competetive equality in contrast with the other Circuits, this Court should resolve the conflict.

CONCLUSION

This Court should determine whether *St. Louis* is no longer the law. In addition, if the authority of a national bank to branch is not tied to state law, this Court, not the Fifth Circuit, should overturn *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U. S. 252, 87 S. Ct. 492 (1966).

This court should also decide the important question regarding the unprecedented imbalance in the dual banking system caused by the Fifth Circuit decision. Deference to the Comptroller to determine the power of a national bank to branch eliminates the cornerstone of the dual banking system. Congress has never implicitly or explicitly

delegated to the Comptroller, the ability to determine branching power or policy. In the face of such a clear restriction on delegation and the plain language of the National Bank Act, deference is not warranted.

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted this 27th day of March, 1998.

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